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POLYGRAPHS IN THE WORKPLACE

HEARING

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

REVIEWING THE USE AND ABUSE OF POLYGRAPH TESTING IN THE WORKPLACE

JUNE 19, 1987

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POLYGRAPHS IN THE WORKPLACE

FRIDAY, JUNE 19, 1987

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The Committee met, pursuant to notice, at 10:15 a.m., in room SD-430, Dirksen Senate Office Building, Senator Edward M. Kennedy (Chairman of the Committee) presiding.

Present: Senators Kennedy, Thurmond, and Humphrey.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. The hearing will come to order with some television footage from WDBM, Channel 9 in Washington, NBC TV; WCAU TV, Channel 10 in Philadelphia; and "60 Minutes" of CBS. I think the video clip speaks volumes about the problem we are facing in the workplace today.

The use and abuse of the so-called lie detectors has reached truly alarming proportions. Experts project that over 2 million of these tests are administered annually. The vast majority of these tests are not being administered to criminals, or even spies. The vast bulk of the polygraph testing today is being done by private employers testing ordinary workers.

This testing is being conducted despite the overwhelming consensus in the scientific community that there is no physiological response indicative either of truth or deception.

We have known this for some time. A House Government Affairs Subcommittee found over 20 years ago:

> There is no lie detector, neither machine or human. People have been deceived by a myth that a metal box in the hands of an investigator can detect truth from deception.

In 1983 the Office of Technology Assessment concluded:

> While there is some evidence for the validity of polygraph testing as an adjunct to criminal investigations, there is very little research or scientific evidence to establish polygraph test validity in screening situations, whether they be preemployment, preclearance, periodic or aperiodic, random or dragnet.

Last year the House passed Congressman Pat Williams' Polygraph Prohibition Act by a convincing margin. The Senate Labor Committee reported out similar legislation introduced by Senator Hatch and myself by an 11-5 bipartisan vote.

Time ran out last year on us in the Senate, but it will not slip by this year. Legislation protecting the millions of Americans subjected to what the late Sam Ervin referred to as the "twentieth century witch craft" is necessary now more than ever.

Today we will hear from both proponents and opponents of polygraphs, from the users, the practitioners, law enforcement, employee representatives, and the scientific community. Hopefully the testimony we hear today, coupled with the hearing on this issue last year, will guide the Committee as we craft a legislative solution to this national employment disgrace.

We will move ahead now with the video presentation.

[Video presentation.]

The CHAIRMAN. We are delighted to welcome to our hearing this morning our first panel, the distinguished Attorney General from New York, Bob Abrams; Mr. Ernest DuBester of the AFL-CIO, and Dr. John Beary on behalf of the American Medical Association. Welcome, gentlemen.

I want to say, it is a special pleasure to see the Attorney General, Bob Abrams, who I have had the great pleasure of knowing for a number of years and working on a number of different matters as a member of the Judiciary Committee. We know of his very distinguished service as the Attorney General of New York.

We are glad to have you back. We know how active you have been on this issue and we look forward to your testimony. We will start with you, Attorney General Abrams.

STATEMENTS OF ROBERT ABRAMS, ATTORNEY GENERAL, STATE OF NEW YORK; ERNEST DUBESTER, AFL-CIO, WASHINGTON, DC; AND DR. JOHN S. BEARY III, AMERICAN MEDICAL ASSOCIATION, WASHINGTON, DC

Mr. ABRAMS. Thank you very much, Senator Kennedy. I am delighted to receive your invitation to be here today. Accompanying is Assistant Attorney General Jane Laver Barker, who is the person in charge of our Labor Bureau that has been supervising a lot of the reports and investigations that we have had on this issue.

To testify today about the need for Federal legislation banning employers from using lie detector tests to screen job applicants and to interrogate employees is an important responsibility of mine and I thank you, Senator Kennedy, and the members of your Committee for allowing me and my fellow panelists to focus on this very important issue.

Almost two million American employees are subjected to polygraph testing each year as a condition of employment. The jobs and the reputations of these people thus rest on the use of a device which I and many others believe is little better than tea leaf reading or crystal ball gazing. The list of authorities condemning the polygraph as unreliable and inaccurate is daunting.

The Federal Office of Technology Assessment in a comprehensive study issued three and a half years ago, which you made reference to in your own opening statement, found no evidence to establish the scientific validity of polygraphs when used for personnel screening. The American Medical Association has condemned as unscientific the use of the polygraph test in the employment setting.

The Defense Department's top physician has recommended against its use for defense employees. Federal courts have disapproved of the use of polygraph test results in criminal cases be-

cause the device lacks scientific credibility. The Office of Technology Assessment found that even in the narrowest and most focused type of inquiry a criminal investigation of a specific incident, polygraph tests incorrectly label as liars an average of 19 percent of truthful people.

The error rate is far greater when the polygraph is used for personnel screening. However, even when using the conservative 19 percent estimate of the nearly 2 million employees and the applicants for employment tested last year, we therefore have a minimum of 400,000 honest people who were unfairly branded as liars and will have had their lives scarred.

These mistakes occur because the machine does not and cannot actually distinguish true statements from false ones. A polygraph merely charts changes in a person's breathing, perspiration and blood pressure as he or she responds to various questions. Since the interpretation of these charts by the polygraph operator is, of necessity, a subjective process, the operator's prejudices, moods and feelings can strongly influence and even determine the outcome of the test.

For example, we have received complaints about a polygraph operator who consistently fails a much higher percentage of black subjects than white subjects.

Now, whether a person passes or fails the test also often depends on the state of his or her health. People with breathing or heart problems can show false reactions to questions and then fail the test. In one case a long-time department store employee in my own native city of New York who had a speech and breathing problem was told by his doctor that his disability would render polygraph measurements meaningless. Although the polygraph examiner was informed of the doctor's opinion, the employee was forced to take the test. He failed it and was fired despite an excellent employment record.

Not only are so-called lie detectors shockingly inaccurate, their use constitutes one of the most significant threats to the fundamental right of privacy that we as Americans enjoy. President Carter's privacy protection study of 1977 concluded that the polygraph is an unreasonable invasion of the personal privacy that should be proscribed. Those who take the test suffer the indignity of being attached to a machine that scrutinizes their bodily functions and are often then asked offensive questions about personal aspects of their lives which are none of their employers business.

We have had complaints from people who have been interrogated at length about their sexual habits, their religions, their relationships with their spouses and families, their debts, their medical and psychiatric histories, and other highly sensitive topics. Many applicants and employees report that during polygraph examinations they are asked questions about their marital status, arrest records, and medical histories.

Employers may not legally ask these questions, because of State and Federal civil rights and employment discrimination laws, and courts in New York have taken the position that polygraph operators are agents of employers. Yet, many polygraph operators routinely elicit this information from test subjects and then pass it on to employers where it results in precisely the kind of discrimina-

tion against the applicant or employee that these laws were passed in the first place to eliminate.

There are other further abuses associated with polygraph tests. The machine can be used as an instrument of coercion, as in the case reported to my office of the employer who threatened Spanish speaking employees with punishment by the Immigration Service and the police unless they took the test or admitted to acts that they did not in fact commit.

In one notorious case, 11 women were sexually abused and harassed while taking polygraph examinations in connection with jobs in western New York in a convenience store chain. In another case, a 16-year-old girl was hooked up to the machine for two and a half hours in the basement of her workplace, sexually harassed, and finally intimidated into confessing that she stole money from the store where she worked when, in fact, no money was missing at all.

The abuses inherent in this practice are compounded by the refusal of many employers and examiners to tell the employees why they failed the test. In order to protect the pseudo-scientific aura surrounding their occupation, examiners are extremely secretive about the test process and often refuse to disclose the areas in which they claim an employee is lying. Thus employees are powerless to clear their names because they do not know the nature of the accusation against them and they cannot confront their accusers.

Instead, the polygraph is therefore a judge and jury and there is no appeal from its verdict.

For example, two women came to my office who had been fired from a major department store where one had worked for 12½ years and the other for 23 years. They had sterling records. They received many bonuses and merit increases. They were highly regarded by their supervisors. Nevertheless, one day they were called to the personnel office without any prior warning and they were forced to take polygraph tests right on the spot or they were told they would be dismissed.

There had been no thefts in their departments, but they were selected at random to take the polygraph as a control measure. Due to their extreme nervousness and tension under the circumstances, both failed the test and they were fired. These women do not know why they failed, since the store refused to release the report it received and to identify the polygrapher who performed the tests.

Both women are older workers who found it difficult to obtain other employment, particularly since the store shares employee information with other stores and they were fired under a cloud of suspicion, even though there had been no incident or theft.

Being unjustly branded a liar by this gadget is a stigma that clings. It never lets go. It brands you forever. Whenever a person who has failed the test applies for a job, it is likely that he or she will be asked whether or not they ever failed or refused a lie detector test, or to take such a test. Paradoxically, a truthful answer to that question may end any chance that that individual has for employment.

We get many calls from frantic parents whose children failed polygraph exams and were fired from their very first jobs. Even

where the test were given at random and there was no evidence of employee theft, these children may be branded as thieves for the rest of their lives.

Federal legislation, therefore, is needed to stop this abuse. The current State-by-State patchwork of laws and regulations has not only permitted this practice to continue in all too many States, such as my own, but has made it difficult if not impossible for States which seek to prohibit the practice to enforce their laws.

For example, in New Jersey it is a crime for an employer to require an employee to take a lie detector test. But employers evade New Jersey's law by sending employees to New York to be polygraphed. While the New Jersey Attorney General's Office has prosecuted six such cases in the last 2 years, in many more instances the practice continues undetected or is difficult to prove beyond a reasonable doubt.

Employers with operations in both States will hire in New York, supposedly for New York jobs, and then quickly transfer the new employees to a New Jersey office or a New Jersey store.

The Connecticut Attorney General's Office reports similar problems in enforcing Connecticut's polygraph prohibitions. Polygraph testing by employers is an appalling practice which must end. While no one denies that the problem of inventory loss facing American employers, the wholesale use of this device is no solution. It simply gives employers a false sense of security while depriving hundreds of thousands of honest Americans of their livelihoods each year. I call upon you to protect the jobs and reputations of millions of Americans by banning the use of this dangerous and damaging pseudo-technology by employers.

The CHAIRMAN. Thank you very much, Attorney General Abrams. We know you have been active in this field for many, many years so we give special credence to your testimony.

We will continue with the panel and then come back to questions.

Mr. DuBester.

Mr. DUBESTER. Thank you, Mr. Chairman.

I appreciate the opportunity this morning to present the views of the AFL–CIO on the use of polygraphs. This is one of today's fastest growing vehicles for employee intimidation and discrimination. As you are well aware, Mr. Chairman, Congress has been considering bills on polygraph use going back at least to the 93d Congress.

Unfortunately, absent Congressional action on this subject, the uses and abuses of polygraphs has been increasing alarmingly. In the last 10 years the use of polygraphs has quadrupled four-fold, and as you have acknowledged and Mr. Abrams has acknowledged, the number of polygraph tests administered per year now numbers about 2 million.

The vast majority of those tests, Mr. Chairman, are administered to workers and job applicants by private employers, a number larger than that administered by law enforcement agencies and Government agencies combined.

While polygraphs are degrading and intimidating, the worst feature about them, of course, is that they just do not work. Even supporters of polygraphs admit that they are wrong at least 10 percent of the time. Giving them the benefit of the doubt, therefore, under

ideal conditions, as Mr. Abrams also has acknowledged, hundreds of thousands of Americans either lose their jobs or are denied employment opportunities not because of their work record but because of inaccurate tests.

These statistics are even more disturbing when you take into consideration the large number of polygraph tests that are administered in the screening context of large numbers of people. Again, Mr. Abrams has referred to the study by the nonpartisan Congressional Office of Technology Assessment, which has indicated that polygraph use is particularly inaccurate when polygraphs are used for screening purposes.

Even the FBI does not believe that large-scale screening is an appropriate use of the polygraph test and they have regulations restricting the use of polygraphs for the screening of large numbers of suspects.

You may recall last year, Mr. Chairman, that even polygraph advocates such as F. Lee Bailey acknowledged that polygraphs were never intended to be used for preemployment screening. The shotgun-type questions that are asked during a typical preemployment polygraph examination provoke responses that are beyond the polygraph examiners ability to interpret.

But regardless of how one judges the merits of polygraphs as an employment tool, one factor is clear, and that is coercion, whether explicit or implied, is always a factor. Polygraphs may not be able to distinguish truth from lies, but they certainly scare and intimidate people. As one polygrapher characterized them, they are the best confession getters since the cattle prod. Employees and job applicants know that the refusal to volunteer for a test can cost them their jobs.

One major reason we are told by proponents of polygraphs and many employers that we should accept these abuses is to control internal theft, which is, obviously, a serious and legitimate concern. But unfortunately, Mr. Chairman, there is little reliable data that the use of polygraphs can decrease theft. The Office of Technology Assessment, again, indicates that there does not appear to be any formal cost-benefit analysis which shows that the use of polygraphs reduces employee crime.

What is clear, however, is that profitable businesses can be run without resorting to polygraphs. Many of the largest successful companies do. In 21 States, including your State of Massachusetts, Mr. Chairman, which already ban or restrict polygraph use there is no comparative data to indicate that employers are unable to run profitable businesses in those States.

In addition, I would refer you to a 1982 study commissioned by the U.S. Department of Justice's National Institute of Justice which concluded that assessing previous theft activity outside of the working place through the use of polygraphs has little relevance to future workplace behavior. However, checking on one's previous pattern of employment history and dedication to former employers are probably better indicators.

I would add, Mr. Chairman, that that study also noted that corporate kickbacks, embezzlement and securities fraud, and insurance fraud cost businesses three times more than employee theft. And shoplifting also represents more than half of the losses attrib-

utable to employee theft. Now, I daresay that there is not much use of the polygraph in corporate board rooms, nor of customers.

I might add that I would not be suggesting that such uses be made. This is a serious problem, but I think the best solution is to have employers and workers combat the problem together and I think the best tool that employers could use are good and effective employment practices, and I would submit that polygraph testing, Mr. Chairman, is not a good nor proper employment practice by any definition.

The second major argument we hear from proponents of the polygraph use is that this is a matter that is best left to the States to address and regulate. As you know, over 40 States and the District of Columbia have passed some kind of legislation affecting the use of polygraph machines. But nonetheless, the incidence and abuses of testing are escalating and increasing. As Mr. Abrams noted, the results of State efforts are a confusing patchwork of easily evaded restrictions, prohibitions, regulations and other licensing requirements.

Again, as Mr. Abrams illustrated, many employers can simply skirt even the best of State laws by sending employees and job applicants to take tests in neighboring States with no restrictions. So it is clear, Mr. Chairman, States are not protecting workers and job seekers from the dangers of abusive and inaccurate lie detector testing, and jobs are too important in today's economy and often times too scarce to allow an inaccurate machine to dictate the employment fate of hundreds of thousands of Americans.

The time is long overdue for Congress to prohibit these inaccurate and intrusive machines in the workplace. Only when that is done will workers regain the dignity and self respect they deserve. So I would join with Mr. Abrams, Mr. Chairman, in urging you and this Committee to move expeditiously in reporting out a bill on polygraph use and moving on to the Senate Floor.

Again, I thank you for this opportunity.

[The prepared statement of Mr. DuBester follows:]

**TESTIMONY OF ERNEST DuBESTER, LEGISLATIVE REPRESENTATIVE
AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS
BEFORE THE COMMITTEE ON LABOR AND HUMAN RESOURCES, U.S. SENATE
ON THE ABUSE OF "LIE DETECTORS" IN EMPLOYMENT**

June 19, 1987

Mr. Chairman, I appreciate this opportunity to present the views of the AFL-CIO on the abuse of polygraphs and other so-called "lie detectors" in America's workplaces.

Although the Constitution and the courts protect American citizens from polygraphs in the hands of law enforcement officials, American workers have no Federal protection whatsoever from "lie detectors" in the hands of private employers. As a result, employers administer over two million polygraph examinations every year -- more than all police forces and intelligence agencies combined.

To honest workers who just want to get or keep their jobs, a polygraph test can be frightening and humiliating. Electrodes are attached to the worker's fingers, a blood pressure cuff is wrapped around one arm, and a pneumatic tube is strapped around the chest.

In some cases, a tube may be stretched around the worker's throat to gauge swallowing and voice-muscle tension. Some of the most "sophisticated" polygraphs are connected to chairs wired to detect muscle pressure and body movements. Meanwhile, the polygraph examiner stands behind the chair, with the worker's future, reputation and job in his hands.

Is it any wonder that one examiner called his polygraph "the best confession-getter since the cattle prod"?

Once strapped to a polygraph, workers and job applicants are frequently asked about family problems, levels of job satisfaction, sexual preferences, personal finances, drinking habits, sexual activities, political beliefs, marital relations, and union activities. Polygraphs have also been used to force employees to inform on their fellow workers and to discriminate against some workers on the basis of race and gender. Unfortunately, many workers and job seekers feel compelled to answer all of the polygrapher's questions, because they know that refusal to answer (or refusal to submit to the examination at all) can mean the loss of a job.

"Lie detector" tests are frightening and degrading. But worst of all, they don't work! The Congressional Office of Technology Assessment, the American Psychological Association, the American Medical Association and all objective investigators of polygraph validity agree: "Lie detectors" cannot detect lies. And the result is lost jobs for hundreds of thousands of honest workers and job applicants.

Even proponents of "lie detector" testing admit that test results can be wrong <u>at least</u> 10 percent of the time. Since more than two million "lie detector" tests are administered in the workplace every year, that means even under ideal conditions <u>at least</u> 200,000 Americans may have their employment opportunities terminated, curtailed or blocked -- not because of their work records, but rather because employers rely on inaccurate "lie detector" tests.

Employers use polygraphs extensively to screen job applicants and to screen large numbers of employees during investigations of suspected theft. Roughly three-quarters of the polygraph tests administered by private employers are preemployment screening tests.

The polygraph is inaccurate under ideal conditions. But it is a farce when used in preemployment screening. The Congressional Office of Technology Assessment concluded in a report published in 1983 that "there is very little research or scientific evidence to establish polygraph test validity in large-scale screening . . . situations, whether they be preemployment, preclearance, periodic or aperiodic, random or 'dragnet.'"

Even the F.B.I., which uses polygraphs to investigate crimes, does not believe large scale screening is an appropriate use of the polygraph. Such use is prohibited by internal F.B.I. regulations.

Polygraphers themselves often admit that the polygraph was never intended to be used for preemployment screening. F. Lee Bailey, a long-time polygraph advocate, was asked by this Committee last year if the typical preemployment polygraph exam, which often lasts no more than fifteen minutes, satisfies the requirements of a proper polygraph exam. He replied that these exams are not polygraph tests, that to call them such is a misnomer, and that the questions in these tests tend to be shotgun and provoke responses which are beyond the polygraph examiner's ability to interpret.

To make matters worse for job applicants, commercial polygraphers have a <u>financial</u> incentive to "fail" honest people: the more job applicants a polygrapher "fails," the more tests he has to give -- and the more money he makes.

Unfortunately, to many employers, the accuracy of the polygraph is not important. What is important is the machine's ability to intimidate and coerce. We have heard of employers who tell polygraphers that if their employees do not come out of the examination room in tears, the polygrapher has not done his job.

"Lie detectors" may not be able to distinguish truth from lies, but they do scare people. Polygraphers report that 90 percent of the information obtained from a "lie detector" interrogation is obtained before the examinee is even hooked up, because examinees are so afraid of the polygraph machine!

All of this is justified, employers tell us, because they have no other way to control internal theft. The Committee has probably heard, and may hear again, astronomical estimates of the losses caused by internal theft. These estimates vary widely, and seem to depend more on the motives of the estimators than on any objective collection and analysis of credible data.

In fact, a study conducted for the Justice Department by the National Institute of Justice in 1982 found that "Despite the fact that employee theft is generally viewed as a problem of significant consequence, little reliable data exist regarding the phenomenon. The economic impact figures . . . seldom go beyond the level of alarmist rhetoric."

The same study went on to break down the nature of business losses. The study estimated that securities fraud, corporate kickbacks, embezzlement, and insurance fraud cost business three times more than employee pilferage. Shoplifting costs business more than half the losses attributable to employee theft.

Needless to say, you do not find many polygraph examinations being conducted in corporate boardrooms. Nor do you find many companies polygraphing their customers. We certainly would not support polygraphing in these instances either! Yet if business losses justify polygraphing workers, they would certainly justify strapping corporate executives, directors, and customers to these machines.

I do not mean to trivialize the seriousness of loss problems facing the business community. Internal theft is a problem. Theft by those within an organization can hurt, even cripple a business. Internal theft cheats honest workers out of the fruits of their labors, and must be combatted by workers and management together, with all reasonable means. But polygraphing workers is neither the proper nor the best way for employers to reduce internal losses.

There are effective ways to protect company assets and make personnel decisions without subjecting workers to intrusive, intimidating and inaccurate "lie detector" tests. Employers can protect company assets through a variety of means, including:

good recordkeeping;

attractive employee discounts for company products;

a healthy organizational climate;

loss prevention systems that protect assets without abusing employees;

good management; and

senior management that is honest in its dealings with both employees and customers.

Likewise, employers can make effective employment decisions with careful interviewing procedures, clearly stated job requirements, and testing for specific job skills and talents. Polygraphs are not necessary. They are simply convenient.

In an article publisned by Arthur Young and the National Mass Retailing Institute, David J. Cherrington and J. Owen Cherrington of Brigham Young University recommend several common-sense and non-abusive steps to combat internal theft, such as:

developing a code of ethics;

involving employees in group discussions regarding ethical conduct;

reviewing company policies and practices to identify unethical procedures;

carefully designing a system of internal accounting controls; and

developing a discipline and grievance system that provides "due process."

The National Institute of Justice study suggests that factors such as fairness in employer-employee relations, ethical behavior by higher management, adequacy of communication, recognition of quality performance, and competence of supervisors may reduce theft among employees.

The study concluded that: "we found that applying the law enforcement model to theft does not work very well. For example, assessing previous theft activity outside the work setting (by using polygraph exams) has little relevance to future workplace behavior. However, checking on one's previous pattern of employment history

and dedication to a former employer are probably much better indicators."

Twenty-two states already either ban "lie detectors" from the workplace completely or forbid employers to require the tests -- yet businesses still operate profitably in those states. And despite requests from the House Subcommittee on Employment Opportunities, industries seeking exemptions from federal polygraph legislation introduced by Representative Pat Williams of Montana have not produced any evidence that internal theft rates are higher in states which forbid "lie detector" tests.

In short, the best way to control internal losses is through good employment practices. We believe polygraph testing is not a good employment practice, by any definition.

Mr. Chairman, the states have tried and failed to control the abuse of "lie detectors" in the workplace. Over forty states and the District of Columbia have passed legislation affecting the use of these machines. Yet the incidence of testing and reports of abuse continue to rise. In just the past ten years, the number of polygraph tests administered in the workplace has increased fourfold.

The result of state efforts to deal with the epidemic of "lie detector" testing in employment is a confusing and easily evaded patchwork of restrictions, prohibitions, regulations and licensing requirements. Many employers skirt state law by simply sending employees and job applicants to take tests in neighboring states with no "lie detector" restrictions.

"Lie detector" testing is an unscientific and subjective procedure which violates the most fundamental principles of our Constitution: the presumption of innocence, the right of privacy, and the privilege against self incrimination. It is a national scandal which the separate states have been unable to stop.

The harm to honest workers and job applicants from inaccurate and abusive polygraph tests is too severe to allow American workers to continue without effective protection. Incorrect interpretations of polygraph charts can unjustly condemn and stigmatize honest workers for life, rob them of their livelihoods or bar them from just advancement.

The inability of the states to protect workers and job seekers from the dangers of abusive and inaccurate "lie detector" testing shows that national legislation in this area is not only appropriate, but necessary, and long overdue. Mr. Chairman, Congress has a history and duty of establishing basic workplace standards for American workers. I urge the Committee to act expeditiously on this issue, and to proscribe the abuse of "lie detectors" in private sector employment. Thank you.

The CHAIRMAN. Thank you very much.

Dr. Beary, representing the AMA.

Dr. BEARY. Thank you, Mr. Chairman.

I will begin by reporting two facts: Science has not found a cure for the common cold; and science has not found a machine that can accurately detect lies.

I will let the written documents speak for themselves. I will draw your attention to the reprint from the American Family Practice Journal in March 1986 which summarizes the key points, I hope, in a very clear manner.

The CHAIRMAN. We will make that a part of the record.

Dr. BEARY. Yes, and it has been inserted with the AMA testimony this morning. I will make four points.

(1) There is no pinocchio effect. Despite years of looking, decades of looking, there is no body response that is unique to lying.

(2) The polygraph machine itself is basically a blood pressure cuff with a few attachments.

(3) You cannot make decisions based on the polygraph machine. If the theory is unsound and there is no pinocchio effect—and you will not find anybody here today telling you there is, there will not be anybody here next month telling you there is—then I think that is a logical conclusion.

(4) The fourth point which is logical to ask is, if there is no pinocchio effect, why is the polygraph so popular? Why is it in such widespread use? The answer to that is found in that American Family Practice Article as well. It is what I call the "electronic scarecrow" effect, and I think Mr. Abrams brought that out with some of his examples.

You probably have got some of your own. I have had people correspond with me about similar sorts of things. If a scientifically naive subject, a teenager, or others who may not read the newspapers and the journals as much as those in the room do, is hooked up to the machine he may indeed confess something useful. It has nothing to do with whether the polygraph machine is plugged in or not. It is just the fact that it is an electronic scarecrow.

Of course, there is a cost to those confessions from the scarecrow, and that is a human wastage factor from the careers that are destroyed. We have had examples here and we will hear more examples in the future, I am sure. That is more a political issue, while I am speaking only about science. People making policy decisions about using this machine have to decide what amount of human wastage will be tolerated as a tradeoff to the confessions that are gathered.

I will stop at this point and I would be prepared to respond to any questions you may have.

[The prepared statement of Dr. Beary with attachments follow:]

STATEMENT

of the

AMERICAN MEDICAL ASSOCIATION

to the

Committee on Labor and Human Resources
United States Senate

Presented by

John F. Beary III, M.D.

RE: Use of Polygraph Examinations in Employment

June 19, 1987

Mr. Chairman and Members of the Committee:

My name is John F. Beary III, M.D., and I am Assistant Dean for Planning and Development, Georgetown University School of Medicine. With me is David Heidorn of the Association's Department of Federal Legislation.

I am pleased to appear before this Committee to share with you the American Medical Association's concerns about the use of polygraph testing in the employment setting.

Mr. Chairman, the AMA does not support the use of the polygraph for employment purposes in private industry or federal agencies because the polygraph testing and scoring methods currently used in personnel screening have never been shown to be valid tests of truthfulness. Polygraph testing fails to fulfill scientific principles because it does

not have a high level of predictability. Our position and this testimony are based on a study by the AMA's Council on Scientific Affairs. (Attached is a copy of the full report and an article on the polygraph by Dr. Beary from the March 1986 issue of American Family Physician.)

Background and Present Use

The criminal justice system has long refused to recognize the validity of polygraph testing. Since the landmark decision of Frye v. United States in 1923, [293 F. 1013 (D.C. Cir. 1923)] polygraph test results have not been admissible as evidence to prove guilt or innocence in a criminal trial. Nonetheless, outside the courtroom, where a false determination of an individual's truthfulness is potentially as damaging as an unjust judicial decision, our society is witnessing a rapidly growing use of the polygraph to test truthfulness.

Ten years ago, an estimated 250,000 to 400,000 polygraph examinations were being administered a year. In 1983, the American Civil Liberties Union estimated that 1 million tests a year were being given. In the federal agencies alone, over 23,000 polygraph tests have been performed. However, this great increase in the polygraph's use has arisen in spite of the fact that the scientific validity underlying the polygraph test has not been established.

Evidence of Polygraph Inaccuracy

The best that can be said about the polygraph is that it can provide evidence of deception or honesty in a percentage of people that is statistically only somewhat better than if chance judgments were made. Studies indicate that polygraph tests result in enough false-positive and

false-negative findings of truthfulness that their value in the employment as well as the criminal setting should be considered as little better than the probabilities of chance, or about the same as if one flipped a coin to reach a conclusion.

Statistics show repeatedly that the innocent subject is much less likely to be found innocent than the guilty subject is to be found guilty in the criminal setting. In 1983, the Office of Technology Assessment (OTA) published a review of ten studies of polygraph testing in which the range of values for the percentages of correct or incorrect decisions of guilt or innocence by the examiners varied widely. In one recent study, 91.5% of guilty but only 29% of innocent subjects were correctly identified. In a still more recent study, 75.1% of guilty and 63% of innocent determinations were accurate.

Examining the validity and reliability of polygraph testing is itself problematic. A primary difficulty is that the "ground truth" being sought in the testing is not always known, making it difficult to measure a test's effectiveness. Further, while polygraph instrumentation is rather standard, the structuring and the substance of the questions (depending on the purpose of the test) are central to a test's effectiveness and require great expertise on the part of the examiners. These variables, which are primarily subjective in nature, are often difficult to quantify.

Also, the skill, training, and personal abilities of the examiner, again largely subjective variables, are always at issue. In one study, ten trained polygraph examiners were asked to make judgments on polygraph

records of actual criminal suspects without any interaction with the subjects. Of the 1,120 truth/deception judgments made by the ten examiners, only 63.1% were correct, 35.7% were wrong, and 1.2% were inconclusive. The examiners were also asked to score the level of confidence in the judgment made in each case. Their confidence was higher for judgments of deception than for truthful decisions.

Polygraph in the Employment Setting

While the polygraph test certainly is not accurate enough to establish the ultimate proof of guilt or innocence in a criminal trial, its use as a condition of employment is even less credible, as the few studies done concerning employment testing indicate. In fact, because questioning in the employment setting deals with more minor issues, with the consequences of failure potentially less serious than in a criminal case, it may be anticipated that the physiologic arousal of the subject might be less impressive and the deception of the examiner even easier than in a criminal case.

Most importantly, an unacceptable percentage of "innocent" persons may be labeled as "deceptive" in a polygraph screening situation in which most of those screened were truthful. It has been estimated that, even if the results of the polygraph testing were 95% valid and the predictive value was 50%, in a screened population of 1000 in which 5% were guilty of some transgression, 47 of the 50 guilty people would be apprehended but 47 innocent people would also be labeled as guilty.

Thus far, studies on the polygraph testing techniques used in the employment setting are few, and their scientific validity is certainly no

better than in criminal investigation. In five analogue studies of one common technique used in employment testing, the correct determination of guilt ranged from 60% to 87% and of innocence from 42% to 91%. In a review of another technique, the accurate determination of guilt was 60% to 95% and of innocence 80% to 100%. From these results, it is fair to conclude that the kinds of techniques used in the employment setting are plagued with the same problem of false identification of innocent subjects as in the criminal setting. However, the consequences could be far more damaging. In comparison to the criminal setting where decisions on probable cause and other evidentiary considerations have probably been made before a polygraph test is given, employee subjects are typically not so narrowly selected. There is a far greater likelihood that innocent subjects will be falsely identified in the employment setting.

Conclusion

Mr. Chairman, it is evident that, no matter how much we might wish for a simple tool to solve the complex problem of determining truthfulness, the use of the polygraph is inconclusive as there simply is no magical "Pinocchio effect." Polygraph tests measure nervousness and excitability, not truth. While it is well established that the polygraph can recognize guilty subjects with an accuracy of between 60% and 95% in the criminal setting, which is somewhat better than chance, there is still a significant rate of false-positive and false-negative determinations of deception. It is imperative that the polygraph test never be used as the sole arbiter of guilt, innocence, or employability in any setting.

Further, the use of the polygraph test in applications other than criminal investigation -- most importantly in the employment setting -- has not been adequately studied. In those few studies of noncriminal subjects that have been reported, a wide range of false-positive and false-negative results, similar to that found in the criminal setting, has been reported. Those results suggest too low a predictability for serious consideration of the polygraph test's use in the employment setting. Not only is there a significant false-positive rate, which would misclassify some innocent, truthful subjects as deceptive, but many countermeasures have been used -- sometimes with reproducible success -- to fool the polygraph examiner.

We cannot, at this time, speak to other methods of determining truthfulness in the employment setting, such as paper and pencil tests. However, the AMA does not support the use of the polygraph in industry or in federal agencies as a preemployment test until polygraph testing and its scoring as currently used in personnel screening can be shown to be valid with a high level of predictability. The AMA recommends that research to a much greater extent than is now planned should be supported and conducted if testing for employment purposes (including security clearances) is even to be considered.

Mr. Chairman, we would be pleased to address any questions the Committee may have.

2930p

Council Report

Polygraph

Council on Scientific Affairs

The American Medical Association (AMA) Council on Scientific Affairs has reviewed the data on the validity and accuracy of polygraph testing as it is applied today. The use of the control question technique in criminal cases is time honored and has seen much scientific study. It is established that classification of guilty can be made with 75% to 97% accuracy, but the rate of false-positives is often sufficiently high to preclude use of this test as the sole arbiter of guilt or innocence. This does not preclude using the polygraph test in criminal investigations as evidence or as another source of information to guide the investigation with full appreciation of the limitations in its use. Application of the polygraph in personnel screening, although gaining in popularity, has not been adequately validated. The few limited studies that have been performed suggest no greater accuracy for the types of testing done for this purpose than for the control question polygraph testing used in criminal cases. The effect of polygraph testing to deter theft and fraud associated with employment has never been measured, nor has its impact on employee morale and productivity been determined. Much more serious research needs to be done before the polygraph should be generally accepted for this purpose.

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THE POLYGRAPH is a combination of instruments that records a subject's blood pressure, pulse, respirations, and galvanic skin resistance while a series of questions are posed. In a pretest process, the examiner asks a series of questions to evaluate the voluntary subject (suspect), obtains an informed consent, derives necessary background information, and establishes the kind of relationship that facilitates the test by putting the subject at ease and stabilizing the parameters being measured. Finally, the formal questioning is begun. The subject is given a series of carefully formulated questions: the relevant questions dealing with the issue at hand, irrelevant questions, and control questions. The latter are designed to create the probability that the subject will lie or at least be unsure of the truth of his answer. By comparing the magnitude of responses to relevant and control questions with those to irrelevant questions, the examiner makes an interpretation on the truth, falsity, or inconclusive nature of each response. This is called the "control question technique."

In other applications (eg, federal security and preemployment testing), control questions, relevant/irrelevant questions, or the techniques of concealed information, guilty knowledge, and peak of tension tests are employed. In each of these last techniques, questions are targeted with a different intention than in the control question technique. Thus, although instrumentation is rather standard, it is the structuring and the substance of the questions, depending upon the purpose of the test, that require great expertise and that are central to the effectiveness of the tests. The control question technique has been used for criminal testing and has seen the greatest study.

These "lie detector" tests have been offered in court as evidence since the 1920s. However, in 1923 in the landmark case of *Frye vs United States* (293 F 1013 [DC Cir 1923]), it was stated that "the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, developments, and experiments thus far made." Even after 60 years, this doctrine is still quoted widely in the courts. However, employers are increasing their use of the polygraph to screen prospective employees and workers to determine union sympathies and other attitudes. Even ten years ago, 250 000 to 400 000 polygraph tests were being given per year; in 1983, the American Civil Liberties Union estimated that 1 million tests a year were being performed. In 1982, there were an estimated 3000 polygraph examiners in the United States, and in the federal agencies alone, 23 000 polygraph tests have been performed.[1]

A National Security Decision Directive 84 (presidential directive, March 11, 1981) authorized executive agencies and departments to require that employees take a polygraph test in investigation of "leaks" of classified information to the media. On Oct 19, 1983, the Department of Justice announced that administration policy would also permit government-wide polygraph use for preemployment clearance and other screening of employees, and the Department of Defense has authorized its use in security screening of employees with access to highly sensitive material. Nevertheless, it is important to recognize that, even though such application may be helpful

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Report G of the Council on Scientific Affairs, adopted by the House of Delegates of the American Medical Association at the 1984 Interim Meeting.

This report is not intended to be construed or to serve as a standard of medical care. Standards of medical care are determined on the basis of all of the facts and circumstances involved in an individual case and are subject to change as scientific knowledge and technology advance and patterns of practice evolve. This report reflects the views of scientific experts and reports in the scientific literature as of December 1984.

Reprint requests to Council on Scientific Affairs, American Medical Association, 535 N Dearborn St, Chicago, IL 60610 (William R. Hendee, PhD).

Members of the Council on Scientific Affairs are as follows: John R. Beljan, MD, Philadelphia, Vice-Chairman; Stefano Bertozzi, Cambridge, Mass, Medical Student Representative; George M. Bohigian, MD, St Louis; E. Harvey Estes, Jr, MD, Durham, NC; Ira R. Friedlander, MD, Chicago, Resident Representative; John H. Moxley, III, MD, Los Angeles, Chairman; William C. Scott, MD, Tucson; Joseph H. Skom, MD, Chicago; James B. Snow, Jr, MD, Philadelphia; Richard M. Sternhber, MD, Cleveland; Jack P. Strong, MD, New Orleans; Henry N. Wagner, Jr, MD, Baltimore; William R. Hendee, PhD, Secretary; William T. McGivney, PhD, Assistant Secretary; and Richard J. Jones, MD, Past Secretary (Primary Author).

to the agency, the scientific validity underlying the polygraph test has not yet been established for these purposes.

VALIDITY OF POLYGRAPHY

There is a large amount of experimental psychological literature that examines many physiologic variables of subjects who, under experimental conditions, are asked about a mock crime they may have committed or about certain knowledge they may have been given and told to deny. This type of controlled analogue study may be very important in studying the reproducibility of test methods, examining the parameters most sensitive to deception, and generally defining the limits of the method; however, such studies can only provide a weak simulation of the real-life situation in which perhaps less scientifically motivated examiners are testing people who have been accused of serious crimes. Experienced examiners have claimed that a subject's behavioral cues can often enhance the likelihood of recognition of a deception. It has been shown in the experimentally controlled mock crime situation that an attentive examiner can detect such cues with a frequency that statistically is significantly higher in the untruthful group than in the truthful.

The difficulty in properly assessing the validity and reliability of polygraphy is partly because the "ground truth" is not always known, on the one hand, and the skill and training of the examiner may be at issue on the other. In one interesting study, field-trained polygraph examiners were asked to make blind judgments on polygraph records of 112 criminal suspects drawn from verified and unverified previous police investigations.[2] Half of the records had been verified (ie, ground truth was known through a confession); in the other half, the suspect had finally been judged truthful or deceptive by the original polygraph examiner. Cases were also divided between crimes against persons and crimes against property and between truthful and deceptive; thus, 14 sets of polygraph records were examined in each of eight categories. It is emphasized that only the records were examined; the ten examiners had no interaction with the subjects themselves.

In total, ten examiners made 1120 truth/deception judgments. Of these, 63.1% were correct, 1.2% were inconclusive, and 35.7% were wrong. There were no significant differences for verified or unverified records, for crimes against persons or property, or for evaluations by experienced and less experienced investigators. The examiners were asked to score the level of their confidence in the judgment made in each case. It was higher for deception than for truthful decisions. They also made more false-positive errors and fewer false-negative errors in records based on crimes against persons than on those against property, which suggests that crimes against persons may elicit a stronger physiologic reaction. In this study, true-positive judgments of deception averaged about 77% accurate, whereas true-negative judgments (against deception) were only 51% accurate.

The Office of Technology Assessment (OTA) review considered the outcome of validity measurements in ten such field studies that met their minimum criteria for scientific rigor: a reasonable basis for "ground truth," ie, a confession or the judicial outcome, was known. The range of values for the percentages of correct or incorrect decisions of guilt or innocence varied widely. In one recent study, 91.5% of guilty but only 29% of innocent subjects were correctly identified (52.9% false-positives and 17.6% inconclusive).[3] In a more recent study, 75.1% of guilty and 63% of innocent determinations were accurate, the remainder being false-positive guilty (25.0%) and innocent (37%) decisions.[4] Thus, it can be concluded that, although the polygraph can provide evidence for deception or honesty in a percentage of people that is statistically better than chance, there are enough false-positives and false-negatives to make many applications, perhaps even in criminal cases, of dubious value.

PERSONNEL SCREENING AND PUBLIC POLICY USES

It is obvious that the polygraph is not yet sufficiently accurate to establish the ultimate proof of guilt or innocence in a criminal trial. Its use as a condition of employment to establish national security clearance, determine union sympathies, or detect employees guilty of theft, breach of confidence, or other misconduct has become widespread; however, the few studies that have been done suggest that the techniques employed are no more accurate than the control question method discussed above. In fact, because the questioning deals with more minor issues and the consequence of failure is less serious than in a criminal case, it could be anticipated that the physiologic arousal of the sympathetic system might be less impressive and the deception of the examiner even easier than in a criminal case. Furthermore, the application of the polygraph test to a group, most of whom are certainly innocent, may frighten some into more careful and truthful answers but will also lead to a low level of predictability with a large number of false-positive results.

The erosion of employee morale and the risk of employer liability may not be worth the possible benefits of uncovering a disloyal employee. Furthermore, an unacceptable percentage of "innocent" persons may be labeled as "deceptive" in a polygraph screening situation in which most of those screened were truthful. It has been estimated that, even if the results of the polygraph testing were 95% valid and the predictive value was 50%, in a screened population of 1000 in which 5% were guilty of some transgression, 47 of the 50 guilty people would be apprehended but 47 innocent people would also be labeled as guilty.[1] These calculations, although based on reasonable estimates from the experience in the field with criminal testing, may be too optimistic. Most potential employees are not under the same duress as a criminal on trial and, thus far, studies on the field techniques used in such applications are few and their scientific validity is no better than in the criminal investigation.

There have been no adequate field trials of the techniques now used for personnel screening, although analogue studies of the validity of some of the techniques used have been performed. The zone of comparison test and the modified general question test are based on the same premises and share the underlying rationale of the control question technique. Another format of questioning includes concealed information tests to detect whether the subject has information about a crime that only a guilty subject would have. It may take the form of a guilty knowledge test (GKT) or the peak of tension (POT) test.

In the GKT, there is a larger series of questions that may be of the multiple-choice type as opposed to "yes" and "no" or true and false, and they focus on specific details known only to the perpetrator of the guilty act. In the POT test, five to nine nearly identical questions are asked to which the subject is instructed to answer "no." The critical question is placed in the middle of the series, so that the physiologic response will build up to a peak at that point (if there is guilty knowledge) and then fall back down again as the questioning continues.

Analogue studies on students or oth-

er experimental subjects under controlled conditions have been reviewed.[1] In five studies of control question testing, the correct determination of guilt ranged from 60% to 87% and of innocence from 42% to 91%. Inconclusive results ranged from 5% to 44%, and false-negative (incorrect) results for the innocent ranged from 2% to 17% (average). In a review of five of the GKT analogue studies (which were not truly comparable in design), the accurate determination of guilt was 60% to 96% and of innocence was 80% to 100%. In these studies, an incorrect classification of guilty was made in 8% to 40% of subjects (average, 20%) and misclassification of the innocent as guilty averaged about 5%. Thus, it is fair to conclude that the concealed information tests are plagued, if perhaps less severely, with the same problem of false identification of innocent subjects.

The only analogue study that comes close to applying the control question technique tested military intelligence personnel in preemployment examinations.[5] Volunteers from the intelligence community were asked to respond to a series of questions on date and place of birth, educational history, employment, and residence information. Half of the subjects were told to give certain false information and were offered a reward if they could fool the examiner. Using a zone of comparison technique, the greatest control method, and the relevant/irrelevant technique, the identification of truthful subjects was accurate in 62% to 77% and incorrect in 15% to 23%; in 4% to 19%, the results were inconclusive. Thus, it can be concluded that a great variation in accuracy of classification and a substantial misclassification of truthful subjects occur regardless of the technique employed.

FACTORS AFFECTING POLYGRAPH VALIDITY

Because of the relatively high incidence of false-positive results, many students of polygraphy have tried to improve its accuracy by allowing for, or even eliminating, certain factors that have been shown to impact upon the test's validity. Others have studied countermeasures that might be successful in helping the suspect to defeat the test system. These factors may be broken down into operator characteristics, test subject characteristics, the setting for the test, and external influences. These have been reviewed at length in the OTA report; thus, only selected factors are listed here for the sake of brevity.

Operator Characteristics

Experience.—In one study, assessments made by experienced operators were shown to have a higher validity (91.4%) than those of interns being trained in the questioning technique (77.5%).[6]

Type of Training.—Objective scoring techniques (perhaps by computer) vs subjective analysis of responses need to be studied further to determine the most effective modality.

Selection of Polygraph Trainees.—This factor may play a role not yet identified.

Subject Characteristics

Gender.—Most testing has been done in males; there are few comparisons that might establish applicability of findings to females.

Psychopathy.—Guilty psychopaths may escape detection because they are not concerned about their misdeed; however, this has not been convincingly established by experimental or field trial.

Intelligence.—This factor may play a role in the subject's motivation to deceive or in enhancing the probability of detection, but requires further study.

Ethnic and Group Differences.—These may affect validity but have not been studied; however, the impact of ethnic biases on the subjective interpretations made by the examiner cannot be easily excluded.

Autonomic Lability.—The possibility that some individuals may be subject to easy autonomic arousal and others to late arousal seems very likely, but the extent to which this may mislead examiners requires further study. It appears that changes in ectodermal resistance may be less subject to individual variation than cardiorespiratory responses.

The Test Setting

Belief in the Test.—How much credence an individual being tested places on the polygraph method may determine his decision to try to "beat the machine."

Threat of Punishment.—The more certain that a guilty response will bring serious consequences, the more likely that the outcome is valid. This is the main hypothesis that is being exploited in each polygraph study and may explain some differences between field and analogue studies.

Instrumental Activity.—There is experimental evidence that subjects aware of being recorded have more intense responses to relevant questions, but not to control questions, than they did when they thought they were not being recorded.[7]

Test Location.—Although location of the test is generally felt to be very important, the impact upon validity of whether the test is administered in a special facility or in a room has not been determined.

Extraneous Factors

Physical Activity.—Tensing of muscles was shown to reduce the likelihood of detection from 75% to 10% in one experiment.[8] Other investigators have not always confirmed this, but most have shown that an inconclusive result is easily provoked by such a countermeasure.

Drugs.—Meprobamate has been shown to suppress autonomic activity and facilitate deception,[9] although studies utilizing diazepam or methylphenidate have not borne this out as a general finding for all antianxiety agents. β-Blockade has resulted in an increase in the rate of "inconclusive" tests, even though the overall error rate was not affected. Much more study of the effects of caffeine, alcohol, and psychoactive drugs is needed.

Hypnosis/Biofeedback.—In one isolated study, both hypnosis and biofeedback groups reduced detectability of deception (after training) to less than that in a control group.[10] However, other studies have suggested that hypnosis is not an effective countermeasure to prevent detection.

Mind-set.—Trained individuals who are familiar with the polygraph technique should be able to differentiate between relevant, irrelevant, and control questions. This would improve the possibility of "beating the polygraph test" through cognitive countermeasures. This possibility has not been adequately explored, although, in one preliminary report, subjects who have been coached and tested repeatedly are better able to avoid detection.[11]

Efforts to develop an objective computerized scoring system may have merit, but, in the opinion of most examiners, the subjective input of the examiner in the formulation of questions and in their application remains the critical point of the test as it is used today. Use of the control question technique has been well studied in criminal investigations, and its ability to detect guilt in crimes against person or property is fairly well defined. Nevertheless, false-positive and false-negative results suggest that one must always be left with some doubt in the final determination of guilt or inno-

cence. When the application is changed to preemployment screening or a security clearance, there is substantial evidence that results will not be scientifically acceptable. This is partly because of the purposes of the test, which require significant variations in the questioning techniques used—zone of comparison, POT test, and GKT. These techniques have not been studied sufficiently in the field to determine the true incidence of recognition and predictability of the test results and the success of recommended countermeasures.

SUMMARY

The polygraph instrument records a subject's blood pressure, pulse, respiration, and galvanic skin resistance. In a polygraph test, the variations in these parameters are recorded as the subject responds to a series of questions that are relevant or irrelevant to a specific issue or action under review or are control questions. When the relevant questions are focused on an alleged criminal act, this becomes the control question technique that is used in examination of a suspect criminal. It is well established that the polygraph can recognize guilty suspects with an accuracy (60% to 95%) that is better than chance. However, there is a significant rate of false-positive and false-negative determinations of deception so that the polygraph test alone can never be the sole arbiter of guilt or innocence. So far, this has been largely appreciated by the courts.

Criminal investigation has often benefited from polygraph usage because the investigator can focus on the incident in question, using it as the basis for selecting relevant and control questions in the application of the test, in the full knowledge that the detection of deception will not be absolutely accurate. Sometimes the simple threat of a "lie detector test" may facilitate the obtaining of a confession. At other times, the course of further investigation may be more easily plotted.

The use of the polygraph test in applications other than criminal investigation—for security clearance, preemployment screening, determination of paternity, periodic testing for thievery or disloyalty, cheating on examinations, and the like—has never been adequately studied. In those few studies of the validity of the testing technique that have been reported on noncriminal subjects (using modifications of control question technique), a wide range of false-positive and false-negative results, similar to that found in criminal investigations, has been reported and suggests too low a predictability for serious consideration of this application.

Aside from issues of invasion of privacy, self-incrimination, and impairment of personal dignity, it must be conceded that the polygraph test is not yet reliable enough to be the sole arbiter of guilt or innocence in a criminal trial. It has not been shown to be any more accurate when applied to personnel screening for governmental or private employers. Not only is there a significant false-positive rate, which would misclassify some innocent, truthful subjects as deceptive, but many countermeasures have been used—sometimes with reproducible success—to fool the polygraph examiner. The recent review by the OTA concluded "that there is only limited scientific evidence for establishing the validity of polygraph testing. Even where the evidence seems to indicate that polygraph testing detects deceptive subjects better than chance . . . significant error rates are possible, and examiner and examinee differences and the use of countermeasures may further affect validity."[1]

CONCLUSIONS AND RECOMMENDATIONS

The Council offers the following conclusions:

1. In considering the scientific validity of polygraphy, one must consider the purpose of the test and the type of questioning technique employed. Each application must be examined individually.

2. Although the control question technique has been carefully studied in the context of a criminal investigation, where its limitations have been fairly well defined, the validity of this or other more commonly used techniques for personnel screening has not been adequately studied.

3. Those studies that may have some analogy to the use of the polygraph in personnel screening have demonstrated similar high levels of false-negative and false-positive classifications of innocent and guilty subjects that impair the use of the polygraph in criminal investigation.

4. The success of several countermeasures to prevent detection of deception has been legendary, yet serious scientific study of such countermeasures, such as tensing certain muscle groups, has been quite limited.

5. The possible savings in control of employee fraud and theft that might be accomplished by polygraph screening has not been examined in any scientifically valid study, nor has any investigator adequately examined the possible impact of polygraph screening on employee morale and productivity.

6. In screening tests applied to a large work population, predictability depends on the incidence of true-positive test results in that population but also on the false-positive and false-negative test results. This means that even with a test of 95% accuracy in a population containing few guilty subjects, an unacceptable number of truly negative (truthful) subjects can be misclassified as positive (deceptive).

The Council on Scientific Affairs, in view of these conclusions, makes the following recommendations:

1. Until polygraph testing and its scoring as currently used in personnel screening can be shown to be valid with a high level of predictability, the AMA should not support the use of the polygraph in industry or in federal agencies as a preemployment test.

2. The AMA should also recommend that, when any federal agencies believe that such polygraph screening tests are both ethically acceptable and administratively necessary for security clearance, much more research than is now planned on this specific application should be supported and conducted.

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Guest Editorial

The Polygraph: Does It Really Detect Lies?

About one million Americans are given polygraph tests each year. Despite its widespread use in government and private business, the polygraph, or "lie detector," has not been subjected to much scientific scrutiny until recently.[1] The key question—"Is there a specific physiologic response that predicts the cognitive state of lying?"—is only now being explored with rigor.

The search for a specific physiologic response that correlates with lying has been going on for centuries. An old Bengali practice was to require a suspect to lick a hot iron when charged with a capital crime. If his tongue was burned, he was sentenced to death; if he had enough saliva to prevent a tongue burn, he was set free.

William Marston is regarded as the father of polygraphy in the United States. His device, which measured systolic blood pressure, was used to investigate the 1920 murder of Dr. Robert W. Brown, a prominent Washington physician. However, in the precedent-setting *U.S.* v. *Frye* case, the court would not accept the test results as evidence because of the lack of scientific support for the lie detector concept.

The modern polygraph is a psychophysiologic recording device. During the interrogation of a suspect, the polygraph records a number of physiologic variables under autonomic control (heart rate, blood pressure, respiration rate and galvanic skin response). Proponents of the polygraph assert that a trained operator can consistently identify a characteristic pattern of physiologic responses on the polygraph tracing that will detect lying with 90 to 97.6 percent accuracy. The operator asks a control question that in most instances will be answered with a lie or will elicit some pattern of arousal. This response is then used to judge responses to subsequent questions dealing with the criminal offense under investigation.

A competently designed study of the accuracy of the polygraph in detecting lies should have the following characteristics: (1) data derived from field investigations, (2) confession-established truth or falsity, (3) absence of bias in the selection of polygraph records for study and (4) decisions based solely on the polygraph tracings and not on subjective factors. Only two studies in the refereed literature meet these criteria.[2,3]

Of course, the accuracy of a test must be described in terms of both sensitivity (ability to find a positive) and specificity (ability to find a negative). Horvath, who is a polygraph proponent, reported a sensitivity of 76 percent and a specificity of 52 percent (false-positive rate of 48 percent). Kleinmuntz's results were a sensitivity of 76 percent and a specificity of 63 percent (false-positive rate of 37 percent). If the 880 records from the two studies are pooled, the sensitivity of the polygraph is 76 percent and its specificity is 60 percent.

The public debate about the polygraph has been confused by its use in four distinct applications, which vary in their scientific soundness. First, the device is used as a lie detector in making decisions about a crime or a security incident. This application lacks a scientific basis because there is no physiologic response unique to lying; thus, it is impossible to have an accurate lie detector.

The polygraph is also used as a lie detector in pre-employment or security screening. In addition to the point made above, the polygraph's sensitivity rate of 76 percent and specificity rate of 60 percent lead to predictive value calculations that fall into an unacceptable range.

A third application involves using the polygraph as an "electronic scarecrow," a term referring to the psychologic effect that the device can have in prompting the scientifically naive to volunteer confessions. As long as legal and personnel procedures protect people against abuses stemming from the first two applications, security managers may wish to take advantage of the "scarecrow" effect.

Finally, the polygraph is used as a "stress detector." This application might be utilized in an interrogation to develop a lead that could then be investigated by traditional detective techniques. For example, a suspect might display unusual sensitivity to a question about some aspect of a crime. This might lead the detective in charge to reexamine all the available evidence to see whether the suspect could be linked to the crime.

In summary, the polygraph cannot detect lies much better than a coin toss (which is 50 percent sensitive and 50 percent specific); therefore, it is inappropriate to make personnel decisions on the basis of polygraph results. Since the 1923 Federal Court decision in *U S.* v. *Frye*, polygraph evidence has not been admissible in federal court proceedings because of the lack of scientific proof that the polygraph can accurately detect lying.

Until state laws are changed so that protection from polygraph abuses is assured, a person who has no choice but to take a polygraph test would be wise to demand a written copy of the test results and a copy of the test tracing. This will be helpful in any subsequent legal action if the situation warrants it.

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The CHAIRMAN. Very fine.

We will move to questioning the panel and I move to ask the staff to follow a 10-minute rule.

Let me ask Attorney General Abrams, is there any evidence that employee theft rate in New York is lower than in New Jersey or Connecticut where the polygraphs are banned?

Mr. ABRAMS. No. We have not seen data to that effect. In fact, just the converse has been reported to us, that in the States where there is the absolute prohibition and ban—and New York is surrounded by those kinds of States—there has not been any reported increase in pilferage. And so we are not aware of any objective data that gives further credence to the argument for the imperative use of the polygraph for that purpose.

The CHAIRMAN. One of the points that is often made in opposition is that this should be left to the States. Can you comment about what happens when you have States that prohibit and States that permit it? Has it been your experience that there is abuse of State laws? For example, assignment and then transferring of employees across State lines? If so, how wide spread is this type of practice.

Mr. ABRAMS. Yes. I think we have got a multiple set of problems resulting from the present situation. You have some States where no action has been taken at all. You have other States where there has been a direct and total ban. You have other States where there has been some regulation, such as licensing of polygraph operators.

You have got a situation in the northeast corridor which confronts New York. I made partial reference to it in my direct testimony. We are surrounded by States that absolutely ban the use of the lie detector, the polygraph—the so-called lie detector—for employment purposes in Pennsylvania, New Jersey, Connecticut and Massachusetts. And national corporations seek to get out from under those kinds of prohibitions by either hiring somebody initially in New York where there is no prohibition and that person goes through the polygraph screening, and then shifts that person to another assignment, to one of the other States, or might even send somebody in from one of those other States to New York.

So it really highlights the problem that we have and therefore cries out for the Federal solution that your legislation, Senator Kennedy, calls for.

The CHAIRMAN. Some have felt that we can meet some of the objections that have been raised during the course of the hearing this morning, that we have licensing boards and regulatory boards that really can do the job.

What is your response to that?

Mr. ABRAMS. I disagree with that because there is a fundamental premise from which I operate and which other reports have clearly documented—the Office of Technology Assessment clearly indicated that—and that fundamental premise is that there is no scientific evidence of accuracy. The device is pseudo-technology. It is unreliable.

So if that is true, then having a licensing process for the operator really begs the question. If it is unreliable to begin with, then no matter what else you try to do to tinker with the use of the machine or the device, then you are still going to hold prey innocent

Americans who are going to fall victim to a life of degradation, unemployment, abuse and I think your allowing us to see some of those television scripts highlights that; the mother who is ashamed to go home and tell her children why she is no longer employed; the feeling of the young teenager who is being accused and being denied employment right at the outset of her life and a career.

Our office has seen all the widespread ramifications by virtue of reports and, frankly, we still suffer from the frustration because they call us and say, what can you do for us? They expect us to be able to give them a positive answer and solution, and we say, we cannot tell you anything. You cannot do anything because New York still does not bar it.

I think it is a shame that the legislature in New York, both Houses, have not seen fit to pass a bill. A bill clears one of the Houses but dies in the other. But again, your solution, together with that of Senator Hatch, I think, provides the answer for New Yorkers and for all Americans across the country to have a uniform approach to bar this device in the employment context.

The CHAIRMAN. Very fine.

Mr. DuBester, how common is the practice by employers to take employees across State lines for testing? Do you find that?

Mr. DUBESTER. Well, we get repeated reports from our affiliated unions in the organized sector of this practice being undertaken. Again, I think as Mr. Abrams pointed out, it is particularly common when you are in a metropolitan area, be it New York with New Jersey and Connecticut surrounding it with different kinds of laws.

I think right here in the District of Columbia we have another good example where you have a prohibition law in the District. You have Virginia, very close, with no law on polygraphs, and then you have Maryland which has something in between; employers cannot require the polygraphs but they can request that employees so-called voluntarily take them.

Those kinds of areas, particularly when you consider the wide variety of laws in the States, are prone to lead to the temptation that employers often follow of taking employees across State lines and avoiding the restrictions that are in their own State.

Again, particularly, the kinds of employers like the chain stores where they have facilities, obviously, in many States and many neighboring States. It is something that they can easily do and we get many, many reports of that.

The CHAIRMAN. Let me ask you, why can't you protect your members with contract language in collective bargaining?

Mr. DUBESTER. Well, the collective bargaining process, Mr. Chairman—in fact many of our affiliated unions can and do try to provide for protections of their employees. Employers have an obligation to bargain over the uses of polygraphs. We can, hopefully, get some restrictions in the collective bargaining agreements on the use of polygraphs, and where there are abuses, hopefully grievance and arbitration provisions will provide further protections for employees that are represented.

But I think the key point to bear in mind here, as we have talked about it this morning in the statistics we referred to, is that we have two million polygraph tests administered every year, and

at least 75 to 80 percent of those are in the preemployment screening area.

Now, we can provide protections for our employees where we represent them, but we are virtually powerless to provide any protections for the vast millions of employees who are out there trying to get jobs in the initial instance, and that is where a major problem lies.

The CHAIRMAN. Let me move on to Dr. Beary. Could you just explain the technology of the polygraph and maybe, briefly, its evolution?

Dr. BEARY. Yes. Essentially, a human being can either be excited or relaxed or somewhere in between those states. Mr. Wiliam Marston, who actually worked in the D.C. area and I believe is buried in one of the cemeteries around here, invented the machine. In the early 1920's it was a blood pressure cuff, and a device to record your heart rate. A little later on they added a device to see how much you were sweating. It still measures the same thing, that is, whether the subject is aroused or nervous or not.

Lying is one of about a half a dozen different reasons a person can be nervous. Some people get nervous just by having a blood pressure cuff put on. It is well known in medicine that the nurse's reading will always be about 10 points lower than the doctor's because the white-coat effect brings the pressure up. I see this week after week as I see patients of my own.

So really, the machine may look impressive to the scientifically unsophisticated, but it really is nothing more than a fancy blood pressure cuff, and that is about where it stands today 60 years or so after it started out.

The CHAIRMAN. The OTA drew a distinction between preemployment and random results as compared to specific incident results. Could you comment on that?

Dr. BEARY. Okay. In addition to the basic scientific issue of there being no pinocchio effect, the mathematics of screening also constitute an important factor. If you are testing somebody for cancer, let's say, you do not want to have 10 false alarms for every true alarm. So if you are screening 1,000 people, for instance, even if your test is 95 percent accurate—and no one is claiming the polygraph is even close to that, you will falsely classify 50 people and ban them from a job. Remember that you are 50 percent accurate just by guessing because there are only two choices, heads or tails, liar or truth teller.

The mathematics of screening are a little complicated so it is worth getting out the calculator and going through it and convincing yourselves—but the screening situation results in a large number of innocent being falsely labeled as liars.

So you start with a flawed machine and you compound it by doing screening. I think even the polygraphers agree that screening is totally unsound. There has not been anybody from the scientific community, even the polygraph industry sponsored Ph. Ds who have done research, who will talk about Baye's theorem and approve the polygraph for screening. Just for the record, the technical terms of interest are "specificity, sensitivity, predictive value, and Baye's theorem."

The CHAIRMAN. Very helpful.

Senator Thurmond.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, I want to commend you for holding hearings to consider whether polygraph testing should be prohibited in the private sector. The House of Representatives is considering legislation which would completely prohibit polygraphs in the workplace. I believe it is essential that we in the Senate carefully consider whether such a federally imposed prohibition is necessary.

I have often expressed my firm belief in the principles of the 10th amendment to the United States Constitution. Those powers which are not expressly delegated to the Federal Government are reserved to the States. Accordingly, I am not convinced that the regulation of the use of polygraphs should be a matter of Federal law.

Incidentally, the State governments have already taken the initiative on this issue. Thirty-one States have enacted polygraph regulatory legislation. While it is clear that the polygraph is a controversial instrument, I am concerned that the approach taken by the House of Representatives goes too far and undermines the hard and careful work that the States are doing to develop law in this area.

The continued debate among scientists and academicians regarding the validity of the polygraph is evidence that this issue has not been resolved. We therefore would be taking a substantial risk in prematurely formulating a national policy on polygraph testing.

Further, it has traditionally been the authority of the States to regulate commerce within their boundaries. For instance, States have mechanisms to certify that those who deliver health care services to residents are qualified to do so. State governments regulate insurance companies and real estate brokers in order to set standards for the services they deliver.

The services offered by polygraph examiners are well within the ability of States to regulate, as is evidenced by the majority of States which have already enacted polygraph legislation. Last year as this issue was being discussed, I received a letter from Assistant Attorney General John Bolton which expressed the views of the Justice Department on this issue.

In that letter Mr. Bolton asserted, and I quote:

> Polygraph misuse may be more appropriately deterred by restricting the conditions under which polygraphs are administered rather than prohibiting their use altogether. The States are better equipped to make those determinations.

Mr. Bolton suggested that States can provide avenues for appeal if someone feels his or her rights have been violated. States also can regulate the kinds of questions that are asked during polygraph tests, the equipment that is used, and the qualifications of examiners.

I look forward to further elaboration of these views by the Department of Justice before this Committee.

Mr. Chairman, this is an important issue and I look forward to hearing from representatives from all the affected parties as this Committee considers legislation in this area. Regrettably, schedul-

ing conflicts may prohibit me from remaining for the entire hearing, but I intend to review the written transcript of this hearing at a later time.

Now, I want to present a few questions to the distinguished Attorney General. We are glad to have you with us, Mr. Attorney General.

Mr. ABRAMS. It is a pleasure, Senator Thurmond.

Senator THURMOND. If there is a problem created by polygraph testing in New York for New Jersey and Connecticut employers, is not the solution more readily available in Albany rather in Washington?

Mr. ABRAMS. Well, we have tried to seek a solution in Albany and it has been unavailing. What I think we have found is what I referred to earlier as patch quilt, unevenness, some States doing nothing, other States deploying a total ban, other States regulating. As a result, we have not had uniformity.

We have had the irony of New York—as I was replying to Senator Kennedy's earlier question—being a launching pad for getting out from under the regulatory process or the prohibition process that has been established in surrounding States. Mr. DuBester talked about how that same thing is done here in the Washington, D.C. capital area, and I suspect that that happens elsewhere around the country.

We also know that as a result of regulation that has been promulgated in the bulk of the States, there has not been enforcement—unanimity of enforcement or any enforcement. So I think what we want to do is get uniformity. For example, in only two States where the polygraph has been regulated has there ever been a revocation of a polygraph operator's license. And in only five States has there ever been suspension of a polygraph license.

So you have this crazy patch quilt, and therefore we assert that action by you at the Federal level will give a uniform standard and then we will have uniform enforcement and application in the 50 States.

Senator THURMOND. Now, in New York City you prohibit anyone from owning a handgun, do you not?

Mr. ABRAMS. That is correct.

Senator THURMOND. Well, that would not work in Wyoming. Is it not a matter for each State to determine those things?

Mr. ABRAMS. Well, I think here, Senator, in the area of labor we have seen the Federal Government pass the Fair Labor Standards Act, the National Labor Relations Act, the Occupational Safety and Health Act. We have seen when it comes to the working conditions of the average man and woman in this country you and your colleagues step in and pass uniform standards. We submit that this, too, is in that tradition.

Senator THURMOND. Well, simply because the Congress went into some fields that maybe they should not have is no excuse, is it, for violating the Constitution?

Mr. ABRAMS. Well, I do not think this is——

Senator THURMOND. Congress makes mistakes as well as other people.

Mr. ABRAMS. Well, I do not think this would be a violation of anybody's rights. Indeed, it is just the opposite. People's rights are

being violated today, and as a result of your action in this area we will have the termination of the horrendous violation of people's lives. I have been personally moved to listen to men and women, reputable citizens, the President of a women's club attached to a congregation out in Long Island who was accused of being an arsonist because of the supposed results of a lie detector test.

Time and time again people who have to live for the rest of their lives with the stigma, with the branding of this machine that has been documented not to be scientifically accurate.

Senator THURMOND. What you are saying is it is not perfect. In other words, it is not perfect.

Mr. ABRAMS. Well, it is far from being not perfect. Under the best of circumstances, it is 19 percent inaccurate.

Senator THURMOND. Well, you have probably handed down some decisions as Attorney General of New York that are not perfect, have you not?

Mr. ABRAMS. Well, that is true.

Senator THURMOND. In other words, there are errors in every field, are there not? In the medical field? I have got eight doctors in my family. I am sure they have made some mistakes, but they do the best they can.

Mr. ABRAMS. Well, when we are talking about people's lives—their reputation and their lives—and as I pointed out in my direct testimony, if you look at the OTA results, 19 percent under the best of circumstances error factor, 2 million tests being applied, that means 400,000 people run the risk every year of being wrongly branded. I think that is a very damaging thing and for us to know that and to not take action at the Federal level, I do not think that is a service to our constituents.

Senator THURMOND. I have another question. As the chief law enforcement official for the State of New York, can you tell me if the State of New York uses the polygraph to screen applicants for law enforcement positions or other positions?

Mr. ABRAMS. Well, I think it varies throughout the State.

Senator THURMOND. Well, do they use it at all?

Mr. ABRAMS. I think it is used.

Senator THURMOND. Well, do you want to stop them from doing it?

Mr. ABRAMS. No. What I think is the law today, Senator, is that in New York the polygraph is not admissable in evidence in criminal cases. That, again, demonstrates its lack of reliability. It is used, and it is helpful, in the law enforcement context, in many instances to help demonstrate the innocence of somebody.

But there is a difference in its use and application in the law enforcement context from the context within which we are talking about today. Today we are talking about the employment context. It is the sole and exclusive determinant in whether or not a person gets hired. It is the judge and jury and sole exclusive determinant in whether somebody gets fired.

In the law enforcement context it is not used exclusively. It is one of a number of things that are used in the process of trying to ascertain accuracy or believability.

Senator THURMOND. Well not necessarily. In other words, they can accept it or not, just like in law enforcement they can accept it or not.

Mr. ABRAMS. I am sorry. I did not quite catch that.

Senator THURMOND. I said, not necessarily. They would not have to turn somebody down if they did not meet this test. It merely gives them some information that may be helpful. They can use it or not, just as the law enforcement people can use it or not.

Mr. ABRAMS. Well, our experience, Senator, is that when an employer finds that an employee has, quote, "failed the test," that employee is fired, dismissed, that job applicant is not hired. Again, there have been egregious circumstances. Exemplary employees, long-term employees, somebody worked 23 years in a department store, who got awards, who got promoted, who got bonuses, who everybody thought the world of. She was not suspected of any crime and in a random sampling she was called down, she was absolutely terrified; what is happening to me; why am I being strapped to this machine; and she, quote, "failed the test," was dismissed. And because she was an older woman and because she could not effectively respond when she looked for further work about why did you lose your last job and whether you ever failed a lie detector test, her life was literally smashed to smithereens.

Senator THURMOND. Well, of course, some errors are made. But you remember, in Wall Street recently in these white collar crimes, people who had fine reputations, everybody thought there were perfect, they did a lot of investing, they made millions of dollars, but then it turned out that they were crooks.

Mr. ABRAMS. Again, I think we have got the record——

Senator THURMOND. Now, as a State official are you concerned about the drift—and this is a very important question—are you concerned about the drift of governmental power away from the States and toward the Federal level?

Mr. ABRAMS. At times I am and at other times I am concerned about the lack of action taken by the Federal Government to step in and protect the rights of 240 million American citizens, and in this case I think that Federal action is warranted and, indeed, desperately needed.

Senator THURMOND. You know, this is the 200th year of the celebration of the Constitution. I think it would do us all good to go back and read it again. And can you find authority in that Constitution to take the position you are taking here today?

Mr. ABRAMS. I do.

Senator THURMOND. Where?

Mr. ABRAMS. I think it is the same authority that gave us the right to——

Senator THURMOND. Where has this been delegated to the Union? Is that not a matter for the States?

Mr. ABRAMS. I guess back in the Roosevelt era when Senator Wagner talked about the establishment of the National Labor Relations Board and the National Labor Relations Act there were many who felt that it would be unconstitutional and the United States Supreme Court has passed on that question and with respect to other important Federal legislation that has passed concerning the rights of individuals in the workplace.

I think so, too, under those kinds of precedents, would this kind of enactment pass constitutional grounds.

Senator THURMOND. Well, in 1896 the Supreme Court held in *Plessy* v. *Ferguson* that separate but equal was constitutional. But in 1954 in *Kansas Board of Education* it held it unconstitutional. So the Supreme Court is not always perfect, is it?

Mr. ABRAMS. I agree with you on that.

Senator THURMOND. But the Constitution says what it means and it means what it says. We have gotten too far away from it. Anything we want to do, if we cannot get the States to do it, we want to bring it to Washington, and they want to pass a statute to do it. Now, you can do this constitutionally by amending the Constitution. You can put many fields at the Federal level that are not warranted now by amending the Constitution. But they want to do this by statute.

This bill is trying to do something by statute that should be done by a constitutional amendment.

That is all, Mr. Chairman.

The CHAIRMAN. General, I suppose you remember the efforts that have been made, even by members of this Committee, to change the Hobbs Act, to take away local jurisdictions from the States and make it a Federal Act if there is violence on the picket line. Remember that? There were many of those that wanted to just run rampant over States rights on that one. But you talk about protecting the workers, oh, no.

I remember the old *Jones and Laughlin* case. Do you remember that from law school? The *Jones and Laughlin* poultry case, the commerce clause. There are a few time-honored precedents in terms of what our responsibilities are.

We have heard some arguments fly year in and year out, so you get some flavor that there is not uniformity on this Committee on this legislation.

Senator THURMOND. I agree.

The CHAIRMAN. See, we do agree on some things. No, we work together and we also differ.

I want to thank the panel. It has been very interesting. I thank Dr. Beary, as well, on the medical aspects because your testimony, I hope our members will get a chance to review that because I think there is a scientific base for this legislation, which is of enormous importance.

I think Mr. DuBester and General Abrams have pointed out what the current situation is across the country. General Abrams also pointed out the need for this in so many circumstances. So it has been excellent testimony.

I want to thank you all very much.

Senator THURMOND. Mr. Chairman, I had a few questions of Dr. Beary before the panel is through.

Did you have any more questions?

The CHAIRMAN. No, I do not.

Senator THURMOND. Dr. Beary, why is the AMA involved in an issue of controversy that relates to law enforcement or security rather than medicine?

Dr. BEARY. Well, for a couple of reasons. The AMA is run like a congress in a way. Each of the States bring concerns to the AMA. I

have with me David Heidorn from the Office of the AMA who can, perhaps, give a written insert for the record to describe that process.

But in this particular case one of the States raised an issue that affected one of their members or perhaps a family member. Since it is a scientific issue (the polygraphers often compare themselves to medical diagnosticians and so forth), the AMA Council on Scientific Affairs did this report that is in our testimony.

I simply live in Washington and am AMA member and so that is how I happen to be here today.

Senator THURMOND. What experience does the AMA have in the use of the polygraph technique?

Dr. BEARY. Well, it would use the different components, of course, since the blood pressure cuff the heart rate counter, the electrocardiograph, and all of these things that make up this machine came from medicine. The science underlying polygraphy is called psychophysiology and, of course, that is a branch of medicine. It is an applied aspect of science. That is where the tie-in is. It is through physiology.

Senator THURMOND. How was the AMA position developed? Are you expressing your views, the views of a commission or committee, or are you expressing the views of a poll taken of all the doctors in the United States?

Dr. BEARY. Well, I am expressing the views of the AMA Council on Scientific Affairs which held hearings on this.

Senator THURMOND. That is just a commission then, a committee of the AMA.

The CHAIRMAN. Can he finish, please?

Senator THURMOND. Yes, excuse me. I did not mean to cut you off.

Dr. BEARY. The House of Delegates, Mr. Heidorn reminded me, voted on these recommendations. The Council proposed them but then the complete House of Delegates which has 1,000 members or so, it is quite representative—it is a real democracy, has the final say. So none of these things are ever just one or two person's views. They were thoroughly considered and voted on by the decision-making AMA body, the House of Delegates itself.

Senator THURMOND. But there was not a vote by all the doctors in the AMA? This was the House of Delegates?

Dr. BEARY. Well, they are all representatives of doctors but——

Senator THURMOND. I understand that. You did not answer the question.

Dr. BEARY. No, the 300,000 doctors did not get together and——

Senator THURMOND. I asked you the question, whether a poll was taken where all the doctors voted or just this House of Delegates?

Dr. BEARY. The House of Delegates voted.

Senator THURMOND. Well, that is all I want to know. Now, if the AMA position is based on its own established empirical evidence, does it also oppose the use of polygraph for national security or law enforcement purposes? If not, why not?

Dr. BEARY. Well, we have not taken a position on that. That has not been explored.

Senator THURMOND. That would be a pretty tough one for you to take, would it not?

Dr. BEARY. Well, it is just thought that national security is a special field by itself and that people who——

Senator THURMOND. Now, it says doctors rely on diagnostic instruments. Should not law enforcement or security officers also have access to diagnostic instruments?

Dr. BEARY. Well, I guess I would answer that by saying that because the pinocchio effect has not been able to be found and that "60 Minutes" tape we saw earlier showed that no camera was stolen, yet three different polygraphers found a crook in each of those investigations, that raises, I think, some questions.

Senator THURMOND. I just have one more question, and thank you very much for your appearance.

Are medical diagnostic techniques infallible and 100 percent reliable?

Dr. BEARY. No, they are not.

Senator THURMOND. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Well, Dr. Beary, we thank you very much. I think you are here to speak to the science of a system which purports to be a medical system. I have my differences with the AMA from time to time on policy questions, but I think with regards to science, their record is an unblemished one. Sometimes we differ in terms of applications of policy and other kinds of issues, but in regards to the science on this, it seems that what the AMA, what the OTA, what the other kinds of science research has demonstrated quite clearly is the same conclusion that you have testified today. So it should not be any surprise.

I want to thank the panel very much. We appreciate your presence. It was good to see you, Bob.

Our next panel is made up of William Scheve, President of the American Polygraph Association, William Zierden of the Circuit City Company on behalf of the U.S. Chamber of Commerce and their polygraph coalition, and Mr. Richard Sullivan of Conrail on behalf of the American Association of Railroads.

Welcome, gentlemen. We will start with Mr. Scheve.

STATEMENTS OF WILLIAM J. SCHEVE, JR., AMERICAN POLYGRAPH ASSOCIATION; WILLIAM ZIERDEN, CIRCUIT CITY STORES, INC., ON BEHALF OF THE CHAMBER OF COMMERCE POLYGRAPH COALITION; AND RICHARD C. SULLIVAN, CONRAIL, VICE PRESIDENT, RESOURCE DEVELOPMENT

Mr. SCHEVE. My name is Bill Scheve and I am President of the American Polygraph Association. I want to thank you on behalf of our organization for the opportunity to present our views on the legislation you are considering.

We understand this Committee's interest in focusing public attention on the potential for the abuse of the polygraph technique. While we share this concern, we do not believe that the solution lies in banning the polygraph in the public sector.

The polygraph has unwittingly been called a "gimmick" and a "gadget" and claims have been made that the polygraph is abusive. It is not the instrument but rather the few unskilled or unethical

examiners who cause isolated instances of polygraph abuse. For a polygraph examination to be valid and reliable, it is essential that the polygraph examiner be highly trained and qualified in using the polygraph technique.

Legislation is needed to establish strict Federal standards for training and proficiency of polygraph examiners. The 99th Congress wisely supported increased polygraph testing through an amendment to the Defense Authorization Bill. It established a temporary testing program for civilian and military personnel who have access to highly classified information. Last month the House considered the 1988 version of the Defense Authorization Bill. Members voted to make the temporary testing program permanent by a margin of 345 to 44.

But the need for polygraph testing to protect valuable information and assets does not end with the Government. The polygraph is also valuable in protecting the customers, employees, inventories and assets of American business and industry. While we believe in the fundamental honesty of Americans, we also believe we must be realistic about protection against deceit. More than half of the crimes that occur in this country go unreported or unsolved. Background checks cannot provide information on a thief, a rapist or a drug pusher who has never been identified or caught.

A recent survey was conducted of more than 1,200 businesses that use polygraph examinations. Employers said that the polygraph provides more information for an accurate assessment of an individual than background or reference checks alone. The experience of a number of law enforcement agencies demonstrates the need to use the polygraph to supplement background checks, psychological tests, interviews and other screening techniques.

For example, the Florida State Police administered polygraph examinations to 2,711 applicants between 1980 and 1985. Sixty percent of them were rejected because of confessions during the examinations about their involvement in criminal activities. Studies have also shown that polygraph examiners for the National Security Agency are twice as effective as skilled investigative interviewers in gaining relevant information from persons seeking classified positions.

Critics say the polygraph should be outlawed in the private sector because it is occasionally fallible. No one claims that the polygraph is infallible, but then few if any investigative or other diagnostic tools are.

Drug tests are not infallible, yet the Senate Commerce Committee by a vote of 19 to 1 has endorsed mandatory drug testing for many employees in the transportation industry. The polygraph serves the same function. These tests give employers information they need to make decisions that protect the public safety and welfare.

Other critics of the polygraph have voiced concern about the 5 percent or so of false positives, referring to individuals who are innocent but appear deceptive on a polygraph test. But the concerns about false positives just do not materialize in actual practice. The Defense Intelligence Agency reports that since 1981 it has tested 13,595 individuals, people in critical intelligence positions with access to secret compartmentalized information. Of this number

only 17 were found to be deceptive, and the majority of them provided significant explanations for their deception.

In addition, the Department of Defense reported that it tested 3,993 people for security breaches in 1985 and 1986——

The CHAIRMAN. Can I just ask you there, why is the rejection rate so much higher, then, among the private testers?

Mr. SCHEVE. I suspect it is not that much higher, Senator Kennedy.

The CHAIRMAN. Well, that completely runs into the face of all the testimony we had. Defense says 0.12 percent, and in 1986 it was 0.3 of 1 percent. You are saying that that is from your organization's routine tests, that that is roughly the same percentage that you are taking?

Mr. SCHEVE. No. Our percentage on the outside would be slightly higher because I do believe the qualifications of the average examiner working for the National Security Agency and the Government is higher than that of the average examiner on the outside. This is one of the reasons why I would like to see legislation requiring higher standards.

The CHAIRMAN. All right. Why do not you proceed.

Mr. SCHEVE. In addition, the Department of Defense reported that it tested 3,993 persons for security breaches in 1985 and 1986 and found only 13 to be deceptive, 8 of whom made admissions of improper disclosures of information.

These studies show that the false positive claims are not the significant problem critics claim. The suggestion has been made that Government examinations should be allowed because of the implication that Government examiners differ from examiners practicing in the private sector.

In many instances this just is not the case. I am one of many examiners who have worked for Federal and State law enforcement agencies as well as for private business and industry. The skills and equipment I use are identical for all my examinations.

The Government itself imposes a heavy security burden on many private business. The Nuclear Regulatory Commission and the Drug Enforcement Administration are just two example. The NRC requries investigations of all instances of the sale or use of drugs detected on the sites of nuclear power facilities. Power plan operators agaree it is impossible to adequately screen workers or to conduct these drug investigations without the use of the polygraph. The DEA endorses the polygraph because it knows that the drug industry needs the polygraph to help protect its inventories, thereby helping to protect the health and even the lives of our citizens.

We believe that the polygraph also serves a function in helping Americans get jobs who otherwise might be disqualified. If the polygraph were removed from the workplace the advantage goes to people who are well-known and have roots in the community. In many cases this could work against Blacks, Hispanics and other minorities. Without the polygraph, jobs are more likely to go to those who have consistent and stable work records and whose backgrounds can more readily be checked. Legislation that works against the underpriviledged of our socieity would be counter to the traditions of this Committee.

The Congress itself relies on the use of polygraph examinations to protect this building and the members and staff who work here. The Capitol Police use the polygraph to screen their applicants and to investigate specific incidents, including suspected drug use. That the Congress itself relies on polygraph is still another testament to its value.

The polygraph is valuable to the business community in helping to combat employee theft and thereby hold down the cost of consumer goods. The Fireman's Fund Insurance Company estimates that one-third of all business failures are caused by employee theft.

Estimates of the cost of economic crime against business, including employee theft, range from $67 to $200 billion annually. Further, the National Association of Chain Drug Stores reports that drug store prices have jumped as much as 15 percent because of employee theft.

A number of State courts have held companies liable in matters where customers or other employees were injured or robbed by other employees who were not properly screened. Hotels and motels have been held liable when employees who had access to room keys committed robbery or assaulted guests. Employers must make sure that the people they are hiring are honest and reliable.

Competent polygraph examiners recognize and respect an individual's right to privacy. But we also know that one of the prices we pay for living in a complex society is that we give up some of our privacy for the benefit of society as a whole. We allow ourselves and our luggage to be searched whenever we travel on an airplane, and we must go through a metal detector in order to enter this building.

Regarding public attitudes toward polygraph testing, I would like to cite a recent study by Dr. Frank Horvath of the School of Criminal Justice at Michigan State University. A questionnaire was sent to examinees several months after they took polygraph examinations and they were asked to respond anonymously. The study showed that 70 percent of those who had taken polygraph tests did not find them to be unfair, objectionable or an invasion of their privacy, and about the same number said that they would take the examination again if asked. Of the 30 percent who objected to the exam, the vast majority of them did not meet the employer's standards for employment based upon other criteria.

The approval rates of Dr. Horvath's study mirror almost exactly the results of a recent public attitude poll taken in February of this year by Media General for the Associated Press. The poll showed that two-thirds of all Americans would not object to taking a polygraph examination.

We support the bill H.R. 1536 introduced in the House by Congressman Bill Young of Florida and Buddy Darden of Georgia because we believe it is the most workable polygraph legislation so far presented. It allows continued regulated use of polygraph testing in the private sector and in the public sector. The Young-Darden approach serves the interests of the American people and the needs of American business.

We want to work with this Committee to develop legislation that will ensure the highest standards for polygraph examiners and polygraph testing are instituted and maintained nationwide. What

is needed is a carefully developed body of polygraph law that sets a high standard for all polygraph examinations. We would hope that the Congress would find a way to address the needs of citizens to be protected from the potentials for abuse, but at the same time we believe that Congress should allow business and industry access to an investigative tool they have found so useful.

Federal, State and local governments as well as American businesses have demonstrated through their increasing use and reliance on the polygraph technique that the polygraph technique is needed. It is most often administered in a fair, equitable and nondiscriminatory manner, and it works. Responsible legislation is required. Prohibition is not.

Thank you.

[The prepared statement of Mr. Scheve and a response to a question by Senator Kennedy follow:]

William J. Scheve, Jr.

President, American Polygraph Association

Testimony presented to the

Senate Labor and Human Resources Committee

June 19, 1987

My name is William J. Scheve, Jr., and I am president of the American Polygraph Association. I want to thank you on behalf of our organization for the opportunity to present our views on the legislation you are considering.

The APA is a non-profit technical, professional, and educational organization representing thousands of individual and corporate members. The issue you are considering has special urgency for the thousands of employers we serve, for our members and for the polygraph industry.

We understand this committee's interest in focusing public attention on the potential for abuse of the polygraph technique. We share this concern, but we take a different approach to solving the problem. We feel that the answer lies in establishing strict standards for training and proficiency of polygraph examiners and for the accuracy and quality of polygraph examinations. The answer does not lie in banning the use of the polygraph technique in the private or any other sector.

The polygraph has unwittingly been called a "gimmick" and a "gadget" in the course of the public debate on this issue. While we do not use that same terminology, we agree that the polygraph itself is only one of many diagnostic instruments. What is essential to the validity and reliability of a polygraph examination is that the examiner be highly trained and qualified in using the polygraph technique. It is not the polygraph itself that is potentially abusive but the few unskilled or unethical

examiners who cause isolated instances of polygraph abuse.

The American Polygraph Association believes that all polygraph examiners should be required to adhere to strict standards for training, education, and instrumentation. If the Congress were to extend these standards to cover all polygraph examiners, it would address the problem of potential polygraph abuse in a meaningful way.

In my testimony, I would like to address the value of the polygraph technique in both the public and private sectors. Then I will turn to the American Polygraph Association's recommendations for assurance of high quality polygraph examinations and protection of the rights of examinees. I also would like to address several issues which were raised during the debates on the polygraph technique, specifically public attitudes about polygraph testing and accuracy.

Valuable in private and public sectors

For more than 50 years, the polygraph technique has demonstrated its value as an investigative tool. Our equipment and training have become more and more sophisticated over these decades. The accuracy rate has been demonstrated to be in the range of 90 percent when a competent examiner using properly calibrated equipment is able to reach a conclusion based upon chart analysis.

The polygraph technique is employed by all federal agencies with enforcement powers and by state and local governments in investigations that affect public health, safety and national

security. The increasing prevalence of espionage and deceit in our government, such as the recent security breaches by Marine guards on embassy detail, underscore the need for polygraph examinations. Former Navy Secretary John Lehman said he favors random polygraph testing for embassy guards, both for their investigatory and deterrent value.

The 99th Congress wisely supported increased polygraph testing of civilian and military personnel with access to highly classified information through an amendment to the Defense Authorization Bill. During consideration last month of the 1988 version of this legislation, the House voted 345-44 to make permanent the temporary polygraph testing program that was established in the previous year's authorization bill.

The Congress itself relies on the use of polygraph examinations to protect this building and the members and staff who work here. The Capitol Police use the polygraph to screen their applicants and to investigate specific incidents, including suspected drug use. That the Congress relies on the polygraph is still another testament to its value.

The need for polygraph testing to protect lives, property and valuable information does not end here. The polygraph is indispensable in protecting the customers, employees, inventories, and assets of American business and industry as well, and they also are entitled to access to the polygraph. If the polygraph technique is acceptable in protecting national security and other government interests, it should also be

acceptable to protect the interests of business and industry.

During testimony before this committee last year, noted attorney F. Lee Bailey said that as a defense lawyer, he would hate to live in a society where all polygraph examiners work for the government. He said that would be like having the news media controlled by the government.

Businesses now are required to conduct their own investigations of internal theft and other crimes to protect their assets and their customers. If the polygraph were banned in the private sector, more of the burden for conducting those investigations would be shifted to law enforcement agencies which already are overburdened with the caseloads they have.

Protection for employers and employees

Polygraph examinations have been shown to be one of the most valuable, effective, and credible investigative tools available to employers and employees alike. There are countless examples of polygraph examinations playing a key role in protecting innocent employees and customers, in reducing and in some cases even eliminating internal losses, and in helping to create a safe, secure workplace. It also helps clear innocent employees, thereby protecting their jobs and reputations.

We believe that the polygraph also serves a function in helping Americans get jobs who otherwise might be disqualified because they do not have strong personal or family ties in a community. If you remove the polygraph from the workplace, you give the advantage to people with roots in a community and who

are well-known. In many cases, this could work against blacks, hispanics and other minorities. Without the polygraph, jobs are more likely to go to those who have consistent and stable work records and whose backgrounds can more readily be checked. Legislation that works against the underprivileged of our society would be counter to the traditions of this committee.

Consumers also benefit when businesses have access to the polygraph technique to identify employees who abuse their employer's trust and steal from the company. Employers are able to use the polygraph in investigations to ferret out these insider thefts, thereby helping to hold down prices.

In addition, many businesses find the polygraph valuable in helping them to guard the public interest. Day care centers must be able to investigate when child abuse is suspected. Nursing homes must be able to determine if their sick and often helpless patients are being mistreated. Banks, where 84 percent of losses are attributed to employees, must protect their customers' assets from inside schemes like computerized theft. Public utility companies, nuclear and chemical plants, airline companies and others have major public responsibilities and therefore need access to the investigatory tools that they and the government have found useful.

Drug protection

The Drug Enforcement Administration (DEA) estimates that each year employees steal a million dosage units of controlled substances from pharmacies. In addition, the DEA says that

millions more doses of non-controlled drugs are stolen every year, and these legitimate, but improperly used, drugs are among the most heavily abused. Nearly twice as many people are killed or injured from improper or illegal use of licit as opposed to illicit drugs.

The DEA endorses the polygraph because it knows that the drug industry needs the polygraph to help protect its inventories, thereby helping protect the health and even the lives of our citizens.

There are other examples where the polygraph is used in the private sector in response to federal requirements. The Nuclear Regulatory Commission (NRC) requires investigations of all instances of the sale or use of drugs detected on the sites of nuclear power facilities. Power plant operators agree it is impossible to adequately screen workers or to conduct these drug investigations without the use of the polygraph.

These regulations are designed to protect the health and safety of employees as well as the public in general. The polygraph also is used to help protect the public in other ways.

The polygraph is valuable to the business community in helping to combat employee theft and thereby hold down the costs of consumer goods. According to the U.S. Chamber of Commerce, business executives view employee theft as their most serious crime problem. The Fireman's Fund Insurance Co. estimates that one-third of all business failures are caused by employee theft.

Estimates of the cost of economic crime against business,

including employee theft, range from $67 billion to $200 billion annually. Further, the National Association of Chain Drug Stores reports that drug store prices have jumped as much as 15 percent because of employee theft.

The most effective deterrents against employee theft include thorough pre-employment screening procedures and the means to identify those who have committed theft in the workplace.

Most Americans approve of the polygraph

Regarding reported public opposition to polygraph testing, I would like to cite a recent study by Dr. Frank Horvath of the School of Criminal Justice at Michigan State University. A questionnaire was sent to examinees several weeks or months after they took polygraph examinations, and they were asked to respond anonymously. The study showed that 70 percent of those who had taken polygraph tests did not find them to be unfair, objectionable, or an invasion of their privacy. And about the same number said they would take the examination again if asked.

Of the 30 percent who objected to the exam, the vast majority of them did not meet the employers' standards for employment based upon other criteria.

The approval rates of Dr. Horvath's study mirror almost exactly the results of a recent public attitude poll taken in February of this year by Media General for the Associated Press. That poll showed that two-thirds of all Americans would not object to taking a polygraph examination. They also approved by wide margins polygraph testing for government employees in

sensitive posts and for court testing of suspects.

The American Polygraph Association believes that the majority of America's workers are honest. We believe that these polls reflect this honesty when they show that most people would willingly take a polygraph examination because they are honest.

But while we believe in the fundamental honesty of Americans, we also believe it is essential to be realistic about protection against deceit. About half of the crime that occurs in this country goes unreported or is unsolved. Background checks cannot provide negative information on a rapist, thief or drug pusher who never has been identified or caught.

Take police applicants, for example. Individuals applying for positions as police officers are well aware that they will be subject to very detailed screening checks before they are hired. Consequently, one would expect that police applicants would constitute an honest, law abiding group of individuals.

Yet in their book Truth and Deception: The Polygraph ('Lie Detector') Technique, Reid and Inbau reported that of 415 police applicants they tested, 234, or more than half were rejected because of confessions during polygraph examinations about their involvement in criminal activities, including felony thefts, burglaries, robberies, and the use and sale of illegal drugs.

Similar results were found by the Florida State Police where 60 percent of the 2,711 applicants tested between 1980 and 1985 were rejected, often because of serious admissions during polygraph examinations. Ohio and Maryland also report high

rejection rates.

What these figures show is that background and credit checks and interviews alone simply cannot produce a comprehensive picture of a person's qualifications for a particular job. Polygraph examinations, in conjunction with other investigative techniques such as background checks, are extremely valuable to employers in both the private and public sectors who need assurances they are hiring trustworthy employees.

In a recent survey of more than 1,200 businesses which use polygraph examinations, employers reported that one of the primary benefits of the polygraph is that it provided more information for an accurate assessment of the individual than background or reference checks alone. There is no better source of information about an individual than that individual. Since the polygraph helps in determining whether or not the individual has been truthful about his or her own activities, it simply stands to reason that more will be discovered than would be the case by relying on outside information alone.

The number of polygraph exams

Concerning the number of polygraph tests given, we have heard many times that two million polygraph tests are conducted each year in the private sector. That number has been attributed to the American Polygraph Association yet we have been unable to find any records in our organization to substantiate that figure. It is impossible for anyone to know how many tests are conducted because there is no central registry for licensing of all

polygraph examiners or for the numbers of tests they conduct.

But even if the number were in that range, it would seem to validate the need for polygraph testing. Employers who are concerned about protecting their employees and property are using a method they find effective.

Examinations provide useful information

Critics say the polygraph should be outlawed in the private sector because it is occasionally fallible. Yet medical tests also are fallible and malpractice suits abound because of the mistakes physicians make. The opinions of psychologists and psychiatrists can be unreliable and sometimes have extreme consequences.

In making a medical diagnosis, there are three elements in the decision making process: the patient's history (such as prior illnesses, treatments, and current symptoms), a clinical assessment (such as the physician's examination of the patient), and laboratory tests. All of these factors must be weighed in reaching a diagnosis, and the final decision does not rely on the laboratory tests alone. Patients expect their physicians to use the test results along with other information to make the best decisions they can. That is exactly what the American Polygraph Association advocates regarding polygraph testing. We do not believe that any decisions should be made about an employee solely on the basis of polygraph results.

No one claims the polygraph is infallible, but then few, if any, investigative or diagnostic tools are. The Senate Commerce

Committee by a vote of 19-1 has endorsed mandatory drug testing for many employees in the transportation industry even though no one claims that drug test are infallible. But they do give employers information that they may be able to use to make decisions that protect the public safety and welfare. The polygraph serves the same function.

Concern over inaccuracy

Some critics of the polygraph have voiced concern about "false positives," referring to individuals who are innocent but appear deceptive on a polygraph test. These critics have said that even with a 95 percent accuracy rate, five percent of those examined will show up as errors, some of them as false positives.

Yet in reality, the Department of Defense reported that it tested 3,993 persons for security breaches in 1985 and 1986 and found only 13 to be deceptive, eight of whom made admissions during the test of improper disclosures of information.

The Defense Intelligence Agency reports that since 1981 it has tested 13,595 individuals in critical intelligence positions and/or who had access to secret compartmentalized information. Of this number, only 17 were found to be deceptive and the majority of them provided significant explanations for their deception.

These studies show that large numbers of false positives simply do not materialize in real life.

Polygraph is increasingly accurate

Advances in equipment and methodology have made the

polygraph increasingly accurate, and consequently both the private and public sectors are relying on it more as a tool in their investigations.

The American Polygraph Association has been a leader in initiating these advances. The APA has strict standards for ethical practice and for the professional backgrounds of examiners, and we promote continuing education for members.

The APA demands the highest standards for polygraph examiners and the equipment they use. We know that only through these standards can we assure the greatest accuracy in our tests. It is a fundamental premise that polygraph test results are only as good as the polygraph examiner. We have developed these strict standards for ourselves over the years because we know that the integrity of our profession depends upon the integrity of individual examiners.

The APA's Code of Ethics and Standards and Principles of Practice demand high moral, ethical, and professional conduct. We consider our primary responsibility to be to the person who is taking the examination. We are required to discharge our duties with complete impartiality, dignity, and respect. We are forbidden from allowing considerations of race, religion, politics, union activity, or economic status to play any part in our examinations. We are pledged to issue an objective and unbiased report and to protect the confidentiality of the examination results.

The APA School Accreditation Committee examines the

curricula and instructional staffs of polygraph schools. It also inspects their physical facilities and equipment at periodic and unannounced intervals to ensure APA standards are being met.

Government and private sector examiners

The suggestion has been made that government examinations should be allowed because of the implication that government examiners differ from examiners practicing in the private sector. That just isn't the case. I am representative of a large number of former federal and state polygraph examiners who now work in the private sector. My qualifications are no different today than when I was conducting examinations for federal and state governments. I use the same kind of equipment, the same techniques, and my standards are identical.

The APA maintains and enforces these high standards for our many members, yet we recognize that a number of practitioners who are not affiliated with organizations such as ours may choose not to follow a competent examiner's standards of practice. We also recognize that in the polygraph profession the potential for abuse exists, as it exists with any profession or by any professional utilizing a diagnostic tool. That is why the American Polygraph Association would welcome action by the Congress to ensure that all examiners follow strict standards. We believe the legislation being offered in the House by Congressmen Bill Young of Florida and Buddy Darden of Georgia would meet this test.

They are proposing a carefully considered body of polygraph

regulations. Their bill provides important protection for the rights of examinees. Examiners would be barred from asking personal questions such as religious, racial, political, or labor union beliefs or affiliations. The bill would require all questions to be presented to the examinee in writing before the polygraph examination begins, and any waiver of these rights would be prohibited. Additionally, it would assure the examinee that the results would be kept confidential.

Most important, no decisions about hiring or firing an employee could be made solely on the basis of a polygraph examiner's opinion.

Further, it would encourage the states to develop their own legislation by adopting the federal standards and adding their own provisions adapted to the particular needs of their citizenry.

Most states already have laws regulating the use of the polygraph. Just this year, the Kansas legislature has approved a new polygraph licensing law, and Missouri currently is considering polygraph legislation. The states have proven that they are willing to take on the issue of the polygraph to develop legislation that is appropriate for their citizenry.

Total ban wouldn't work

We support the Young-Darden bill (H.R. 1536) because we believe it is the most workable polygraph legislation so far presented. Last year's debate on the House floor on polygraph legislation showed how complicated it would be to impose a

private sector ban on polygraph use. Dozens of industries pleaded for exemption from the ban and amendments were adopted granting exemptions to government contractors with defense or national security responsibilities, companies that employ persons who have direct access to controlled substances, power plant operators, public water supply facilities and other utilities, security and armored car companies, and nursing homes and day care centers. The list of industries with solid grounds for exemption could have grown much longer, but the House called a halt to the exemptions.

Granting selected industries exemptions sets up a pattern of arbitrary discrimination among American businesses. There simply are too many private sector industries with a legitimate and convincing need to use the polygraph.

Business needs protection, too

A number of state courts have held companies liable in matters where customers or other employees were injured or robbed by other employees who were not properly screened. Hotels and motels also have been held liable when employees who had access to room keys committed robbery or assaulted guests. Employers must make sure that the people they are hiring are honest and reliable.

Competent polygraph examiners recognize and respect an individual's right to privacy. But we also know that one of the prices we pay for living in a complex society is that we give up some of our privacy for the benefit of society as a whole. We

allow ourselves and our luggage to be searched whenever we travel on an airplane, and we must go through a metal detector in order to enter this building. Companies can ask prospective employees to take physical examinations and drug tests and to allow investigations of their work histories and personal associations.

We recognize that the right to privacy must be balanced with other rights as well. A company has the right to protect itself against individuals who might take actions that destroy a company or its reputation or that cause harm to customers or other employees.

Seeking the best solution

With public attention focused on truth telling, both in the private and public sectors, we encourage the Congress to carefully study the best way to ensure integrity in the workplace. A bill that was approved by this committee last year would unfairly outlaw an investigative tool which has demonstrated its validity and utility. We believe a better approach is to allow continued, regulated use of polygraph testing. The Young-Darden bill serves both the interests of the American people and the needs of American business. We ask that the polygraph not be banned. We are helping American business and industry do what they must to protect themselves and the public.

We want to work with this committee to develop legislation that will ensure that the highest standards for polygraph examiners and polygraph testing are instituted and maintained

nationwide. What is needed is a carefully developed body of polygraph law that sets a high standard for all polygraph examinations. We would hope that the Congress would find a way to balance the needs of citizens to be protected from the potential for abuse at the same time it allows business and industry access to an investigative tool they have found useful.

Federal, state and local governments, as well as American businesses have demonstrated through their increasing use of and reliance on polygraph testing that the polygraph technique is needed, that it is most often administered in a fair, equitable, and non-discriminatory manner, and that it works. Responsible legislation is required. Prohibition is not.

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July 12, 1987

The Honorable Ted Kennedy
Chairman
United States Senate Committee on Labor
and Human Resources
Washington, DC 20510-6300

Dear Chairman Kennedy:

I am remiss in not having written sooner but have been extremely busy. However, I did want to write and thank you for allowing me the opportunity to present the American Polygraph Association's views on pending polygraph legislation. I was very much impressed with the decorum and dignity with which the hearing was conducted.

I would also like to take this opportunity to clarify an issue that came up during my testimony. You asked me why the "rejection" rate was so much higher among private examiners as opposed to government examiners. I suspect I may have misinterpreted what you were really asking. At the time of the question I was addressing the issue of false positives and I related your question to that. In retrospect I think what you were really asking was why more people fail polygraph tests in the private sector than in the government's counterintelligence screening programs.

As you may recall, I stated that : "...The Defense Intelligence Agency reports that since 1981 it has tested 13,595 individuals, people in critical intelligence positions with access to secret compartmentalized information. Of this number only 17 were found to be deceptive, and the majority of them provided significant explanations for their deception. In addition, the Department of Defense reported that it tested 3,993 for security breaches in 1985 and 1986 and found only 13 to be deceptive, 8 of whom made admissions of improper disclosures of information."

It is important to remember that these tests were conducted purely for counterintelligence purposes and all the relevant questions asked pertained only to espionage and sabotage. In a private sector preemployment or periodic examination, the relevant questions are primarily concerned with theft, the use of illicit drugs on the job, and the truthfulness of the examinee's job application. In the private setting more

AMERICAN POLYGRAPH ASSOCIATION

people are going to be deceptive than they will be in the government's counter-intelligence screening setting simply because there are more thieves and drug abusers than there are spies in our country. I trust that you will agree with me on this point.

Regarding the discussion that took place at the end of the hearing during which you referred to a report prepared by the ACLU in which they stated that in 21 states representing 2,420 licensed polygraph examiners, only 35 complaints were reported by all these boards. In the same 21 states the ACLU received 999 complaints. You offered to allow me to look at the report and to respond if I wanted to. I still have not seen a copy of the report and would very much like to do so. If you will please send me a copy of it, I will be happy to respond.

To provide a brief answer based on the information you presented, I believe that most state polygraph licensing boards do a good job of policing the profession. But as with any regulatory agency or even our court system, they are not perfect. It would also be a mistake to think that every complaint to a polygraph licensing board, or to the ACLU for that matter, is a valid one. Frivolous complaints and law suits are a common problem in this day and age. As I said above, once I receive a copy of the report in question, I will address its contents more specifically.

As I stated in my testimony, The American Polygraph Association is as concerned about abuses in the polygraph industry as you are. We would be honored and privileged to work with you and your committee in an effort to eliminate such abuses.

Once again, thank you for allowing the American Polygraph Association to be heard. If I or any member of my staff can be of any assistance in any way, please do not hesitate to contact me.

Respectfully,

William J. Scheve Jr.

WILLIAM J. SCHEVE, JR.
President

The CHAIRMAN. Very good.

Mr. Zierden.

Mr. ZIERDEN. Mr. Chairman, I am William Zierden, Vice President of Human Resources for Circuit City Stores. I am appearing on behalf of the U.S. Chamber of Commerce, the world's largest federation of business companies, chambers of commerce, and trade and professional associations, and the Chamber-sponsored Polygraph Coalition, a group representing business, trade and professional organizations which make use of the polygraph.

The Chamber and the Polygraph Coalition appreciate this opportunity to present their views. Today I am also accompanied by Roger Middleton, counsel for corporate policy with the U.S. Chamber of Commerce.

Crimes against business cost the American economy at least $40 billion annually with some estimates placing the cost at nearly $200 billion a year. The National Association of Chain Drug Stores estimates that consumers pay between 10 and 15 percent more per item as a result of employee theft. The accounting firm of Arthur Young & Co. found that internal theft, not shoplifting, is the leading cause of increased retail losses.

These insider thefts literally can be a matter of life or death. An estimated $1 billion in drugs are stolen from the pharmaceutical industry every year. The Drug Enforcement Administration reports that when these stolen but legally produced drugs reach the black market they injure or kill twice as many people as do illicit drugs.

As you are aware, the banking securities industry also has been increasingly vulnerable to insider crime. The American Bar Association recently stated that business computers are now being used to embezzle money, alter data, and defraud corporate stockholders of up to $730 million each year. The ABA also stated that employees were responsible for 78 percent of those losses.

American businesses must have continued access to the investigative tools they need to protect their assets and inventories, information, customers, stockholders, and Mr. Chairman, I might add, their other employees.

Polygraph screening is used within the business community for the same basic reasons as other honesty-screening procedures. It cost-effectively reduces losses attributed to internal theft.

Screening procedures to detect high risk employees fall within three major categories. First, background checks, which are generally used only for higher level positions and which are expensive and time consuming. Second, written honesty tests are available. However, I believe the face-to-face interview is far superior to a pencil and paper test. And third, polygraph screening, which is quick and less expensive than the alternatives and which generates information that can predict future behavior more accurately than what could be expected by chance.

The polygraph is an essential tool to an employer, not only for preemployment screening but also as an investigative device when reviewing specific workplace incidents. Daycare centers must be able to investigate when child abuse is suspected. Nursing homes most know if their sick and often helpless patients are being mistreated. Banks must guard customers assets from inside schemes such as computerized theft, and public utilities companies, nuclear

and chemical plants, airline companies, railroad companies and hotels need to be able to use the polygraph to help them protect the public.

On June 26, 1985 the House of Representatives voted 333 to 71 in support of a bill sponsored by Representative Young. This bill allowed the Department of Defense to increase the polygraph screening of personnel with access to sensitive information. During 1986, the so-called "year of the spy," polygraphs were used by our national security agencies at an unprecedented rate. This year the polygraph once again has proven to be a useful tool in assisting our Government in maintaining national security in Moscow.

The CHAIRMAN. You were good to get your testimony in before hand and I saw the references to it, but there is an L.A. Times report that says that Naval Investigative Service Headquarters ordered two field agents to change from non-deceptive to deceptive their rankings of Marine Arnold Bracy's response to lie detector test questions about espionage.

The action was ordered by NIS Headquarters in March to correct administrative error. Does that give you any pause?

Mr. ZIERDEN. That gives me some pause about the internal management of that organization but not about the polygraph test.

The CHAIRMAN. That is right. It would indicate that there is a factor of subjective judgment that is a significant one in terms of the conclusions of the particular report.

I want you to proceed.

Mr. ZIERDEN. On May 11, 1987 the House voted 345 to 44 in support of an amendment offered by Representative Young. This amendment established a permanent polygraph program for national defense agencies. The measure was called, "an important weapon in our war on anti-American espionage." The paragraph has been endorsed by the heads of the Central Intelligence Agency, the Department of Defense, and other national security agencies as being 85 to 95 percent effective and a vital tool in guarding our national security.

Private businesses and industry also need the polygraph to guard sensitive information and to protect the health and security of these work forces and customers. While the Chamber recognizes that polygraph testing is not infallible, we believe the solution is not to ban its use but rather to set strict standards for its careful and accurate application by the private sector. The Polygraph Reform Act of 1987, H.R. 1536, introduced by Representatives Young and Darden, would accomplish that goal.

In conclusion, the Chamber and the Polygraph Coalition support legislative initiatives such as H.R. 1536 which could ensure responsible use of the polygraph while also allowing for the continued use of this vital tool.

A comprehensive security interview—and I would like to underscore that, Mr. Chairman—a comprehensive security interview and polygraph program has contributed to Circuit City's rate of unexplained merchandise losses of a half percent of sales versus the 2- to 5-percent which are experienced by other retailers. We have to work against a 3- to 3½-percent after-tax profit and this is important, therefore, to our success.

We think that a professionally managed program helps us to maintain a crime and criminal-free place to work for our employees who are honest, a difficult task, at best, in the face of our country's serious drug problem. The polygraph also lets us offer a more efficient hiring process to applicants, enabling us to often make job offers on the day of application. I think that the solution here rests with firm licensing of the technique, not with taking it away from the private sector.

Thank you for considering our comments and I would be happy to answer any questions you might have, sir.

[The prepared statement of Mr. Zierden follows:]

STATEMENT
on
THE POLYGRAPH IN THE WORKPLACE
before the
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
for the
U.S. CHAMBER OF COMMERCE
by
William Zierden
June 19, 1987

I am William Zierden, Vice President for Human Resources of Circuit City Stores, Inc. I am appearing on behalf of the U.S. Chamber of Commerce, the world's largest federation of business companies, chambers of commerce, and trade and professional associations, and the Chamber-sponsored "Polygraph Coalition," a group representing business, trade, and professional organizations which make use of the polygraph. The Chamber and the Polygraph Coalition appreciate this opportunity to present their views.

Crimes against business cost the American economy at least $40 billion annually, with some estimates placing the cost at nearly $200 billion a year. The National Association of Chain Drug Stores estimates that consumers pay between 10 and 15 percent more per item as a result of employee theft. The accounting firm of Arthur Young and Company found that internal theft--not shoplifting--is the leading cause of increased retail losses. These insider thefts literally can be a matter of life or death. An estimated $1 billion in drugs are stolen from the pharmaceutical industry every year. The Drug Enforcement Administration reports that when these stolen, but legally-produced drugs reach the black market, they injure and kill twice as many people as do illicit drugs.

As you are aware, the banking securities industry also has been increasingly vulnerable to insider crime. The American Bar Association (ABA) recently stated that business computers are now being used to embezzle money,

alter data, and defraud corporate stockholders of up to $730 million each year. The ABA also stated that employees were responsible for 78 percent of those losses.

American businesses must have continued access to the investigative tools they need to protect their assets and inventories, information, customers, and stockholders.

Polygraph screening is used within the business community for the same basic reasons as other honesty-screening procedures; it (cost-effectively) reduces losses attributed to internal theft.

Screening procedures to detect "high-risk" employees fall within three major categories. First, background checks--generally used only for higher-level positions--which are expensive and time-consuming. Second, written honesty tests; however, often there is no correlation between an applicant's test score and future behavior. And third, polygraph screening--which is quick and less expensive than the alternatives--and which generates information that can predict future behavior more accurately than what could be expected by chance.

The polygraph is an essential tool to an employer, not only for pre-employment screening, but also as an investigative device when reviewing specific workplace incidents. Day care centers must be able to investigate when child abuse is suspected. Nursing homes must know if their sick and often helpless patients are being mistreated. Banks must guard customers' assets from inside schemes, such as computerized theft. Public utility companies, nuclear and chemical plants, airline companies, railroad companies, and hotels need to be able to use the polygraph to help them protect the public.

On June 26, 1985, the House of Representatives voted 333 to 71, in support of a bill sponsored by Representative Young. This bill allowed the Department of Defense to increase the polygraph screening of personnel with access to sensitive information. During 1986, the so-called "Year of the Spy,"

polygraphs were used by our national security agencies at an unprecedented rate. This year, the polygraph once again has proven to be a useful tool in assisting our government in maintaining national security in Moscow.

On May 11, 1987, the House voted 345 to 44, in support of an amendment offered by Representative Young. This amendment established a permanent polygraph program for national defense agencies. The measure was called "an important weapon in our war on anti-American espionage." The polygraph has been endorsed by the heads of the Central Intelligence Agency, the Department of Defense, and other national security agencies as being 85 percent to 95 percent effective and a vital tool in guarding our national security.

Private businesses and industry also need the polygraph to guard sensitive information and to protect the health and security of their work forces and customers.

While the Chamber recognizes that polygraph testing is not infallible, we believe the solution is not to ban its use, but rather to set strict standards for its careful and accurate application by the private sector. The Polygraph Reform Act of 1987, H.R. 1536, introduced by Representatives Young and Darden, would accomplish that goal.

H.R. 1536 would:

- establish strict federal guidelines to assure that examiners are qualified and that they use accurate equipment;
- protect the confidentiality of examination results;
- protect the rights of examinees by making it illegal for examiners to ask questions about religious, racial, political, or labor union affiliations or other irrelevant personal questions;

- assure that no employment decisions would be made based solely upon the polygraph test results or the refusal to take a polygraph examination;

- respect the states' rights to modify their own legislation; and

- treat all industries equally by denying special exemptions.

In conclusion, the Chamber and the Polygraph Coalition support legislative initiatives such as H.R. 1536, which would ensure responsible use of the polygraph while also allowing for the continued use of this vital tool.

Thank you for considering our comments. I would be happy to answer any questions you may have.

The CHAIRMAN. Thank you very much.

Mr. Sullivan.

Mr. SULLIVAN. Thank you, Senator.

I would like to submit my statement for the record and summarize it if I may.

The CHAIRMAN. Fine.

Mr. SULLIVAN. I would also like to note that I am accompanied by Captain Michael McKee of the Conrail Police Department.

Mr. Chairman and members of the Committee, my name is Richard Sullivan. I am Vice President of Resource Development for Conrail. I am here representing the Association of American Railroads, the Railroad Personnel Association, and the 3,300 sworn police officers within the United States who serve as members of the railroad police departments of AAR member railroads.

The purpose of my statement is to express the concern felt by the AAR, its member railroads and their police officers about the approach that was used in legislation being considered in the House under H.R. 1212. We feel that bill's total prohibition on the private sector use of polygraph testing, along with the failure of that bill to extend an exemption for testing to para-public police officers, such as the railroad police, would have a serious adverse impact on the ability of this Nation's railroads to adequately protect and ensure the security and integrity of our rail transportation system.

Railroad police are statutorily authorized law enforcement officers. The only significant difference between regular governmental police officers and railroad police officers is their source of compensation. We agree that corrective action is appropriate and necessary to eliminate the mis-use of polygraph testing. We are not opposed to Government regulation of polygraph operators and equipment. However, we are opposed to a total banning of the polygraph.

We are not aware of any railroad that uses polygraph testing as a preemployment screening device for railroad employees. However, railroad police departments and other investigators use polygraph testing in a very responsible and professional manner comparable to our public counterparts and should continue to be able to use this valuable resource in the same manner as their public counterparts.

In further support of this position I offer the following points. Polygraph testing as handled by railroad police departments is offered on a completely voluntary basis by railroad police. Testing is not done on a random basis, nor do we do fishing expeditions. Polygraph testing is used to obtain corroborative evidence and is never the basis for a railroad's principal case against the suspect.

Finally, national security concerns also apply to the railroads. To make the most effective use of railroad police, it is essential that they have at their disposal every possible probative investigative tool.

The Association of American Railroads requests that railroad police and investigatory personnel be excepted from any general prohibitions in any approach that might be similar to that used in H.R. 1212.

That completes my prepared testimony. Thank you very much.

[The prepared statement of Mr. Sullivan follows:]

STATEMENT

OF

RICHARD C. SULLIVAN

VICE PRESIDENT - RESOURCE DEVELOPMENT

CONSOLIDATED RAIL CORPORATION

ON BEHALF OF ASSOCIATION OF AMERICAN RAILROADS

BEFORE THE SENATE LABOR

AND HUMAN RESOURCES COMMITTEE

JUNE 19, 1987

Mr. Chairman and members of the Committee, my name is Richard C. Sullivan. I am Vice President of Resource Development for Conrail. I am here representing the Association of American Railroads (AAR) and the 3,300 sworn police officers within the United States who serve as members of the Railroad Police Departments of AAR member railroads. The purpose of my statement is to express the concern felt by the AAR, its member railroads, and their police officers about H.R. 1212. We feel the bill's total prohibition on the private sector use of polygraph testing, along with the failure of the bill to extend an exemption for testing to para-public police officers such as the railroad police, will have a serious adverse impact on the ability of this nation's railroads to adequately protect and assure the security and integrity of our rail transportation systems.

Railroad police are statutorily authorized law enforcement officers who are appointed or commissioned by the governor of a state and/or approved by the state attorney general or a senior state law enforcement official. In most states, railroad police are granted full police powers equivalent to those conferred upon the police of the state or its municipalities, or sheriffs of counties. As such, they are fully empowered to enforce all state criminal laws on the property of the railroad companies employing them and, in many cases, in the counties in which the railroads operate. In most states railroad police even have statewide jurisdiction. Generally, railroad police receive training and certification equivalent to their governmental counterparts. They have primary jurisdiction for investigating crimes involving the railroads, and they work closely with state and federal law enforcement authorities to prosecute criminal activity. When necessary, they are available to assist and back-up local governmental police officers. The only significant difference between regular governmental police officers and railroad police officers is their source of compensation.

We recognize that there are serious problems with the misadministration of polygraph tests and the misuse of the results of these tests throughout the states. We agree that corrective action is appropriate and necessary to eliminate the misuse of these tests. We are not opposed to government

regulation of polygraph operators and equipment. However, we are opposed to a total banning of the polygraph in a manner which will remove a useful tool from the arsenal of the professional police officers who have a legitimate need for it as an investigative tool.

We are not aware of any railroad that uses polygraph testing as a pre-employment screening device for railroad employees. Generally, most of the railroad police departments use polygraph testing on a very rare and selective basis in investigating criminal activity. It is our contention that railroad police departments use polygraph testing in a very responsible and professional manner, comparable to our public counterparts, and should continue to be able to use this valuable resource.

In further support of our position I offer the following points:

1. Polygraph testing is offered on a completely voluntary basis by railroad police and allows those innocent suspects to exculpate themselves.

2. Testing is not done on a random basis, but only when a person is suspected of, or is believed to possess relevant information concerning a specific crime. The railroads have no inclination to conduct such "searches" of its employees without identifiable cause.

3. Related to that is the effort of railroad police to refrain from "fishing expeditions." Polygraph testing is used to obtain corroborative evidence and is never the basis for a railroad's principal case against a suspect. The suspect retains all the due process rights he has coming under the American criminal justice system.

4. Finally, national security concerns, which explain in part the exception for governmental units in Section 6 of H.R. 1212, also apply to the railroads. At present the railroads transport a great quantity of hazardous materials, including nuclear wastes. In the future the nation's railroads will be looked to carry strategic nuclear weapons. The dangers inherent in such cargo requires vigilance from those charged with protecting a railroad's property. To make the most effective use of railroad police it is essential they have at their disposal every possible probative investigative tool.

Towards this end, the Association of American Railroads requests that railroad police be excepted from the general prohibitions contained within H.R.1212 as to the use of polygraph tests.

That completes my prepared testimony. I shall be happy to answer any questions the Committee may have.

The CHAIRMAN. Thank you. Maybe we will just start with you, Mr. Sullivan.

I take from your statement that you would oppose a total ban on polygraphs?

Mr. SULLIVAN. Yes.

The CHAIRMAN. But you would not oppose legislation which banned preemployment or random testing?

Mr. SULLIVAN. No, we would not.

The CHAIRMAN. You do not use the polygraph for preemployment screening, and yet theft is a problem in your industry. How do you screen applicants?

Mr. SULLIVAN. We screen applicants on the basis of various types of tests. To the extent that we use written tests, we test applicants in connection with the skills that are required in the jobs for which they are applying. In cases, for example, of police officers, we do background checks that are similar to the checks that are done by Federal Government investigations of security personnel. And of course, for all personnel we do reference checks on the basis of their employment application.

The CHAIRMAN. Are you aware of any differences in theft rates in States where polygraph is allowed and where it is prohibited by law?

Mr. SULLIVAN. No, Senator, I am not. I would be happy to try to develop that for the record.

The CHAIRMAN. Well, that would be helpful if you could give us that.

Mr. SULLIVAN. I do not know if we can, but will be happy to look into it.[1]

The CHAIRMAN. All right.

I understand your position is that you only use the polygraph where there is a probable cause to suspect criminal involvement?

Mr. SULLIVAN. That is correct. Where police officers or investigators have reason to believe that something has happened and the people are specifically involved, where there is an identifiable cause, then we do use polygraphs and we do ask that we continue to have that right.

The CHAIRMAN. And that has proven to be an effective standard?

Mr. SULLIVAN. Yes, sir.

The CHAIRMAN. Now, Mr. Scheve, you state your strong support for the H.R. 1536, the Young-Darden bill; is that correct?

Mr. SCHEVE. Yes, sir.

The CHAIRMAN. That bill would completely ban the voice stress analyzer and the psychological stress evaluator. In fact, it bans all lie detectors except for the polygraph.

Do you support the total ban of these lie detectors because of their inherent inaccuracy?

Mr. SCHEVE. What other lie detectors are there besides the voice stress?

The CHAIRMAN. The voice stress analyzer and the psychological stress evaluator.

Mr. SCHEVE. Those are the same thing.

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[1] The information on employee theft by State does not exist and is therefore not available.

The CHAIRMAN. Well, it bans all lie detectors except for the polygraph. I was wondering why you want a total ban on all of those?

Mr. SCHEVE. Well, that was not my language that was put in there. That was put in there by someone else.

The CHAIRMAN. Well, no, but it is pretty—I mean, I do not know whether it is coincidental or not, but it bans all of those that are your competitors in terms of lie detecting.

Mr. SCHEVE. Legalize them.

The CHAIRMAN. Pardon.

Mr. SCHEVE. I have no feelings about them one way or the other, personally. I do not use it personally, so that is it.

The CHAIRMAN. You have not formed an opinion about whether the voice stress analyzer or the psychological stress evaluator are accurate or inaccurate?

Mr. SCHEVE. I have but it is a personal opinion.

The CHAIRMAN. Well, do you want to share it with us? [Laughter.]

Mr. SCHEVE. I do not think they are valid. They have never been valid. We tested one a number of years ago. I have gone behind voice stress analyzers in criminal investigations on a number of occasions and it was completely erroneous. They called the person truthful and they were not and I got confessions to validate the polygraph tests.

In fact, one of these involved a quadruple homicide.

The CHAIRMAN. Well, the voice stress people claim an accuracy as great as you claim for the polygraph.

Mr. SCHEVE. Yes, sir, and the original test was done on the three contestants on a program called "To Tell the Truth" or something like that about 14 or 15 years ago.

The CHAIRMAN. Well, you are saying they are not accurate at all. They say they are as accurate as you are.

Mr. SCHEVE. That is fine.

The CHAIRMAN. The OTA and AMA and the American Psychological Association all seem certain that there is no scientific validity to any of those tests. So we are pretty hard pressed in terms of——

Mr. SCHEVE. I would note, Senator, that the Federal Government, to my knowledge, does not use the voice stress analyzer or PSE. They experimented with it and for purposes of determining truth or deception and they go exclusively with the polygraph.

The CHAIRMAN. Your own testimony points out that 60 percent of the Florida State applicants failed the preemployment polygraph. There were other references in the testimony. Of 415 police applicants they tested, 234--more than half—were rejected.

So these two studies that you refer to in your testimony are a good deal higher than the less than 1 percent that were referred to in the defense testimony.

Mr. SCHEVE. These are validated people. These were people who made admissions concerning felony crimes.

The CHAIRMAN. Well, what was your 0.1 percent? What were you talking about then in terms of when I was asking about how the——

Mr. SCHEVE. You are referring to the comment on false positives.

The CHAIRMAN. No. You referred in your statement about how DOD uses it and they found one-tenth of 1 percent to be deceptive. I asked you whether that is generally the conclusion in terms of the use of the polygraph and I think you indicated to me that it was, and yet in your own testimony you quote two different studies, which would indicated that the percentage of rejections were 50 and 60 percent.

Mr. SCHEVE. We are talking about apples and oranges, Senator. In one case you are talking about police screening for police applicants where they have gone through psychological testing, they have gone through background checks, credit checks and so forth, and the last step in the process was a polygraph examination. At this point in time 60 percent of those who had applied through the Florida system failed the polygraph test and made admissions about various felony crimes that they had been involved in, or drug abuse.

Where we are talking about the other issue, that issue is the issue of false positives where Dr. Beary and a number of others say that there is a 5 to 10 or 15 percent error factor in polygraph testing. The fact of the matter is, these two studies point out—the study that was done by the Defense Intelligence Service Agency and by the National Security Agency that the number of false positives just does not turn out that way in real life.

The CHAIRMAN. Well, we will have a chance to review those studies in greater detail.

Just in another area, I will submit for the record an ACLU survey of State polygraph licensing boards.

[The survey referred to follows:]

APPENDIX 2

ACLU POLYGRAPH EXAMINERS SURVEY

1. How many licensed/registered polygraph examiners are there currently in your state? ____

2. How many polygraph examiners were the subject of official complaints last year? (January through December 1986) ____

3. Last year, due to the actions of your Board/agency, how many polygraph examiners
   were fined? ____
   had their license suspended? ____
   had their license revoked? ____
   underwent other disciplinary action (specify)? ____

4. In the past ten years, due to the actions of your Board/agency, how many polygraph examiners
   were fined? ____
   had their license suspended? ____
   had their license revoked? ____
   underwent other disciplinary action (specify)? ____

ACTIONS IN THE LAST YEAR

State	# lic	# Comp	fined	suspend	revoked	other	ACLU Complaints
Alabama	203 (98 res)	1	c	1	0	c	12
Arizona							
Ark.	85 (25 res)	1	0	0	0	0	50
Calif.							
Fla.	500	2	1	-	-	-	240
Georgia							
Illinois							
Iowa	5	0	0	0	0	0	24
Ky.	128 (42 res)	0	na	na	na	na	24
La.							
Miss.	164	0	0	6a	0	0	12
Montana	23	0	0	0	0	0	5
Nebraska	75	0	0	0	0	0	50
Nevada	33	1	0	0	0	0	17
N. Caro	169	0	0	0	0	0	1
N. Mex.							
Okla.	186	3	0	1	2	0	50
S.Caro.	154	0	0	0	0	0	250
S.Dak.	21	0	0	0	0	0	-
Tenn.	165	1	0	1	0	2	50
Texas			refused to fill out survey				
Utah	-	2	0	0	0	1	1

In last year state	#	comp.	fined	susp.	revoked	other	complaints
Vermont	38	0	0	0	0	0	6
VA	294	5	0	0	0	0	50
Wisc.	?	18	0	0	0	7	12
T 25 19	2243	34	1	9	2	10	854

ACTIONS IN LAST 10 YEARS state	fined	susp.	revoked	other
Alabama	c	9	3	2d
Arkansas	0	2	0	0
Florida		(not available)		
Iowa	0	0	0	0
Maine	0	0	0	0
Michigan	0	0	0	0
Mississippi	0	30a	2	12b
Montana	0	0	0	0
Nebraska	0	0	0	0
Nevada	2	0	0	0
N. Carolina		(statistics unavailable)		
Oklahoma	0	2	1	0
S. Carolina	2	1	0	0
S. Dakota '84	0	0	0	0
Tenn. (since 81)	0	1	1	7
Texas	refused to fill out survey			
Utah		(did not send)		
Vermont	0	0	0	0
Virginia		(not available)		
Wisconsin		(don't know)		
T	4	43	7	21

a) suspended for non-payment of license renewal fee, failure to provide proof of insurance, none suspended for disciplinary reasons. All reinstated by years end.
b) extended internship period, denial of application for license.
c) state has no authority to assess fines. They can suspend automatically for failure to notify of change of address. These types of suspensions are not reflected in the figures.
d) 1 letter of reprimand, one arrested for testing wo a license.

Hawaii has no statute regulating polygraph examiners
Oregon has a total ban 55 1 0 0 0 0

The CHAIRMAN. Of the 21 States which have responded, representing 2,420 licensed examiners, only 35 complaints were reported by all of these boards. In the same 21 States the ACLU received 999 complaints.

On examiner was fined, only nine were suspended—six of those quickly reinstated—only two licenses revoked. And in the last 10 years only 7 licenses have been revoked in these 21 State boards covering 2,420 examiners.

Does that sound to you like a regulatory process that is working or which deserves to be perpetuated by Federal law?

Mr. SCHEVE. Yes, sir, it does, because I think the majority of the complaints are coming from States like New York that does not have licensing or regulation.

The CHAIRMAN. Well, these are the licensing States.

Mr. SCHEVE. The ACLU is a legal organization. If there were State licensing boards in those States, why did not the ACLU have them file complaints with State licensing boards?

The CHAIRMAN. Well, they are showing that there are abuses in the States where they do have the boards. They have been raised, and yet it does not appear—at least on these figures or in this report—that the boards are policing themselves. That is not a very, very new concept. There is always a reluctance to do it. We know that inherently.

Mr. SCHEVE. Did I understand you to say 35 complaints?

The CHAIRMAN. Only 35 were reported by all the boards in the 21 States. I will give you a chance to get a look at the report if you want to.

Mr. SCHEVE. Yes, I would like to.

The CHAIRMAN. If you have some reaction to it, I will be glad to have it.

Mr. SCHEVE. Yes, sir, I would.

The CHAIRMAN. I think it is quite convincing in terms of the failure of that particular procedure to be able to protect some of the individuals.

Mr. Zierden, how do you respond to the finding by the 1982 study done by the Justice Department by the National Institute of Justice which concluded, and I quote: "We found that applying the law enforcement model to theft does not work very well. Assessing previous theft activity outside the work setting by using polygraph examinations has little relevance to future workplace behavior."

Mr. ZIERDEN. There are two parts to the answer, Senator. In the personnel field, the best predictor of future performance is past performance. You go back through somebody's life and look at a pattern of achievement, then that is a pretty good predictor of what is going to happen in the future, so that is part of the answer.

It is useful to understand—and in my prepared remarks I stress—that we conduct a security interview, and as part of that interview we may or may not use the polygraph, although the person has volunteered to take the polygraph. It is typically during that part of the interview that we uncover or are able to delve into those areas about which we are concerned, which are principally prior theft from employers and current and prior drug use, and that is basically all we are interested in, because those are predic-

tive of the extent to which we may have a problem with the employee.

Depending on what comes out, we will make a decision about this employee's acceptability. If it is a young person or someone who somewhere in the past has had one incidence of either marijuana use or, for that matter, theft, then we will weigh that and we may accept that employee. On the other hand, if what we see is a pattern of theft and then that couple with clear deception on the polygraph, then that is going to raise some questions that we have to dig into. So I think that I would disagree with that.

The CHAIRMAN. Do you operate stores in Virginia and Maryland?

Mr. ZIERDEN. Yes, sir.

The CHAIRMAN. Virginia allows the polygraph but Maryland prohibits an employer from requiring it as a condition of employment; is that correct?

Mr. ZIERDEN. Yes.

The CHAIRMAN. To your knowledge, has Circuit City ever been found guilty of violating the Maryland law?

Mr. ZIERDEN. Not to my knowledge. And I might add we do not, as a matter of practice, take employees who we are hiring in Maryland, or attempting to hire from Maryland, into Virginia to polygraph. In fact, we just ran a hiring clinic in Anne Arundel County and were very careful about how we treated people who came from the county versus across the county line. We are very aware of those laws.

The CHAIRMAN. Mr. Zierden, I think you heard the testimony during the course of the hearings earlier, if you were here, about the concern that people have about moving people around from one State to another, and I think you have just responded that to your knowledge Circuit City has not been involved in any violations of the law and it is not a part of your policy.

We have a summary of a situation which just came to my attention yesterday. In 1984 Mr. Lloyd Perlman was asked by a manager of the Kensington, Maryland branch of Circuit City to apply for a job as a salesman. He did and he was interviewed by the regional district office manager at the Beltsville, Maryland personnel office. The manager told him he needed to take a polygraph.

Mr. Perlman responded that in Maryland you do not have to take one. The manager responded that, of course, they could not force him to take the test, but if he did not, the process would be lengthy and he could not complete his application. The manager added that they could always assign him to a Virginia store and he would have to take a polygraph there.

Mr. Perlman then agreed to take the test if that was what he had to do. The polygraph was given in Beltsville by an examiner whose office was in Virginia. The examiner told him he had to give him the test so he could get the job and if he failed he would not get the job. He took the test and Circuit City said they would get back to him. They did not.

When he called they said that they did not have any information about his application. Just this past April Mr. Perlman was at another Maryland Circuit City store and was again told he should apply. He stated that he would not because of the polygraph and

was told he could always be assigned to a Virginia store and have to take it.

I see Mr. Perlman. Is that an accurate presentation of the facts, Mr. Perlman?

Mr. PERLMAN. Yes, sir.

The CHAIRMAN. Okay. Well, to your knowledge, Mr. Zierden, is it common to assign Maryland applicants to Virginia stores so they can be forced to take a polygraph test?

Mr. ZIERDEN. No, it is not. It is not the company policy. I will investigate the specific incident.

The CHAIRMAN. Well, we want to thank all of our witnesses here this morning and we appreciate their testimony.

Mr. Zierden, we will make a part of the record your investigation of this situation. We will put that in the record as well.

[The prepared statement of Mr. Perlman, Mr. Zierden's response to the above, and additional material supplied for the record follow:]

Statement of Floyd S. Perlman

My name is Floyd S. Perlman, I live at 4717 Oliver Street, Riverdale, Maryland. I am employed as Marketing Manager by Computer Doctors of College Park, Maryland.

In the summer of 1984 I was asked by a manager of the Kensington, Maryland branch of Circuit City to apply for a job as a salesman. Since I was looking for work at the time I applied for the job and was interviewed by the regional district manager at the Beltsville, Maryland, personnel office.

The manager told me that I needed to take a polygraph test. I had been bonded before and been in management before, so I was shocked and said that you don't have to take a polygraph test in Maryland. The manager replied that if I didn't take the test they would have to do a lengthy investigation and it would take a long time to process my application.

I responded that I had nothing to hide, but why would it slow things down? The manager said that of course they couldn't force me to take the test but the process would then be lengthy and until then I couldn't take any position or have my application accepted. He added that they could always assign me to a Virginia store and I would <u>have</u> to take the polygraph test there. I then agreed to take the test if that was what I had to do to get the job, knowing that a long investigation would make me unavailable for the present opening.

The polygraph test was given in the Circuit City Beltsville, Maryland office by a man who said his office was in Virginia. The examiner told me that he had to give me the test so that I could get the job, and that if I failed I wouldn't get the job. I asked him if this wasn't against the law in Maryland. He told me there would be a lengthy investigation or they would assign me to a Virginia store so I would have to take the polygraph test anyway. He ran through the questions to be asked on the test which mostly involved drug use. I told him that I didn't believe in lie detectors, that they were frequently mistaken, and that I didn't believe that these questions were related to the job. I was hostile to the examiner, who repeated many of the questions.

I was totally disgusted and amazed by the whole affair. I was told that I would hear back from Circuit City but I never was contacted. I called them back two or three times, as they had requested, to see if I had been accepted for the position. I stopped calling after that because I didn't want to badger them.

Last year a woman I know also applied for a position at Circuit City. The store manager where she originally applied all but promised her the job and told her he wanted her for his store and would give her whatever hours she wanted. She told me that they said she had great qualifications and she went through two

interviews. They told her that they wanted her to take a polygraph exam and that she didn't have to take it but that if she didn't it would take a great deal longer before they could call her in to work. She went to take the polygraph and the examiner told her that every Circuit City employee has taken a polygraph test and they are required to take them yearly or upon request. She then refused to take the test. She had a third interview because she refused to take the polygraph and the interviewer was hostile and cold and said she would put her application on file. She never heard back from Circuit City.

Finally, in April of this year I was at another Maryland Circuit City store and was again told that I should apply for a sales position because of my knowledge about stereo equipment. I told them that I wouldn't do it because of the polygraph exam. The salesmen told me, "we could always assign you to a Virginia store and you'd have to take the test", just as the personnel interviewer had.

I believe that we need a uniform federal law prohibiting polygraph tests. It seems to me that Circuit City is using its nearness to Virginia to circumvent Maryland laws. Since, from my experience, they don't hire people who don't take the polygraph test they may also be violating the law in Maryland. I don't believe that people should have their ability to work governed by tests which don't work, or their willingness to answer questions that have nothing to do with the job.

Floyd S. Perlman

6-19-87

Date

Circuit City Stores, Inc.
2040 Thalbro Street
Richmond, VA 23230
804-257-4242

Wm. E. Zierden, Ph.D.
Vice President
Human Resources

June 30, 1987

The Honorable Edward M. Kennedy
U. S. Senate
Washington, D. C. 20510

RE: Senate Committee on Labor and Human Resources - Hearing, 6/19/87

Dear Senator Kennedy:

At the recent hearing conducted before your Committee on Labor and Human Resources, I testified, in response to your questions, that it is not Circuit City's policy to send applicants for employment (or employees) to Virginia to be polygraphed if they exercise their right under Maryland law not to take a polygraph examination. My subsequent investigation has made it perfectly clear that it is also not our practice. We fully respect Maryland's requirement that applicants for employment and employees may only be given a polygraph examination voluntarily, and do not attempt to skirt the law by sending reluctant Maryland applicants to Virginia to be tested. Any claim to the contrary is unfounded.

In the instance you raised involving Mr. Floyd Perlman, the facts do not conflict with our policy. Mr. Perlman was not required, involuntarily, to be tested in Maryland, Virginia or anywhere else. We have no way of knowing, of course, what some unidentified persons may have said to Mr. Perlman about our policies. We cannot possibly respond with particularity about conversations between unidentified people, some of them occurring many years ago. What we can tell you, as we have above, is what our policy and practice is.

We will continue to utilize the polygraph in our company in a lawful manner. It is absolutely essential that we carefully screen our applicants for employment for criminal conduct and drug use since our employees are entrusted with cash and valuable, readily saleable merchandise.

We have found that a professionally and sensitively administered polygraph program contributes to the welfare of our company, our employees, and our customers. When thefts occur, they have a negative effect upon morale, since we must investigate the thefts and, in the course of those investigations, bring innocent and valued employees under suspicion. Furthermore, those investigations distract employees from the performance of their tasks and generate deep concern on their part. It is, therefore, important that we be as certain as we can be that we weed out applicants who may steal merchandise or cash from us or incite others to do so.

In addition, the expense of thefts and security investigations inevitably affect our cost of doing business, and therefore the prices we charge our customers. We have found polygraph examinations, carefully used where permissible, in conjunction with other techniques, exceedingly helpful in obtaining information about applicants and in loss investigations. In some instances, polygraph examinations enable us to clear suspects and hire applicants whom we would otherwise reject. At the same time, our loss prevention efforts are among the most successful in the business, and we need to keep them that way for our own and the public's benefit.

For these reasons, we do question applicants closely about drug use (which can lead to criminal involvement) and about prior criminal convictions. We use a variety of investigative techniques to verify applicants' statements and do not hire those about whom we have doubts. You may be assured, however, that Circuit City does not deliberately violate state or federal law in the course of those investigations, and that it uses great care to avoid doing so. Our goal is to hire, train, and retain employees who are enthusiastic about their work and in whom we can repose trust and confidence. Our enviable growth record attests to the success we have had in that effort, as does the high morale of our existing work force.

I trust this answers your inquiry.

Very truly yours,

William E Zierden -w-

William E. Zierden
VP - Human Resources
Circuit City Stores, Inc.

STATEMENT OF
THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
TO THE
SENATE LABOR AND HUMAN RESOURCES COMMITTEE
UNITED STATES SENATE
REGARDING POLYGRAPHS IN THE WORKPLACE
PROPOSED LEGISLATION CONCERNING THE USE OF LIE DETECTORS BY EMPLOYERS

JUNE 22, 1987

The International Brotherhood of Electrical Workers (IBEW) supports legislative action which protects workers in private industry from intrusive and unnecessary intimidation and questioning through the use of lie dectector tests. The approximately 900,000 IBEW members and their families oppose any exemption for most industries in the private sector.

In the 99th Congress we supported the original bill in the House of Representatives H.R. 1524 until an amendment was added which basically exempted the electric, utility industry. The IBEW also supported S. 1815 which prohibited the use of polygraphs and did not have an exemption for the electric utility industry.

The IBEW and many experts, do not believe any type of polygraph or lie detector is reliable to a degree that would justify mandatory submission to such tests. The history of this spurious technology is full of instances where guilt was not found, while innocence was prosecuted. An example is the CIA employee who spied for the Peoples Republic of China for 30 years, yet the many polygraph tests he took never indicated his activities.

Security, operational integrity, and safety in vital utility systems, is indeed a matter of concern. However, this is nothing new. Historically, utilities have implemented exacting hiring and in-employment policies to assure dependable, trustworthy, and skilled employees. This is a normal function of good management and supervision with which we agree.

In recent years there has been urgent concern about foreign inspired terrorism. This is real and frightening, but actual occurance of such terrorism have been rare to date in our nation. Any connection whatsoever between these problems and the heightened vigilance required to protect industrys would be unjustly and unfairly placed when employees of good record are threatened with oppressive measures.

As to security in nuclear power plants, where some 15,000 IBEW members work, the Nuclear Regulatory Commission requires an extensive background check and investigation of both utility and contractor employees before an employee is granted an unescorted access permit to the facility. The electric industry, as licensees of the plants, has gone to a great extent in the area of behavioral observation of employees permitted access to the plants and vital areas. We view this as a good sense approach to security and safety of employees and facilities.

To further enhance the safety of nuclear power plants, Congress on August 27, 1986, approved Public Law 99-399 which added Section 149 to the Atomic Energy Act of 1954. P.L.99-399 authorizes the Nuclear Regulatory Commission to

implement a program for the Federal Bureau of Investigation (FBI) to conduct criminal history checks of individuals granted unescorted access to nuclear power facilities by the use of fingerprinting.

The IBEW believes the lie detector has very little, if any, validity, as was pointed out in the 1983 study for the Congressional Office of Technology Assessment (OTA). The study, in part, stated: ". . .there is very little research or scientific evidence to establish polygraph-test validity in screening situations, whether they be pre-employment, pre-clearance, periodic, random or 'dragnet'." If polygraph technology is bad science for the vast majority of situations, it is bad science for the utility industry and all of the industry's workers.

In a 1977 doctoral dissertation, Frank Horwath, a professor at Michigan State School of Criminal Justice and Director of the American Polygraph Association, found polygraphs only exonerated the innocent in 51 percent of the tests, or one percent more reliable than flipping a coin. We ask this Committee to imagine placing your livelihood, your good reputation, and your future on those odds.

In the electric and gas utility industry where some 250,000 IBEW members work, has an extremely low labor turnover. It is not at all unusual for an employee to retire with 35, 40, or 45 years of service with one employer. It is interesting to note that utility employers generally take great pride in loyal, dedicated employees who often times serve in demanding, hazardous occupations requiring great skill and training.

We are sure of the reaction of a long service employee, if he or she were requested to submit to a polygraph test. We believe Secretary of State George Shultz summed it up very well when he made the following remarks about the use of polygraphs, "The minute in this government I am told I am not trusted is the day I leave."

Most employees, our IBEW members, usually don't have the same economic advantage or option of picking up and leaving as Secretary Shultz. An employee with years of service with one employer is much more restricted. As long as this employee stays with the employer, he or she will always feel they have the stigma of not being trusted.

If you are talking about a lie detector test as a tool to intimidate, frighten, and cause workers a long-term resentment against his/her employer, then yes, the polygraph will perform to expectations in employment situations. However, the preponderance of evidence shows that lie detector tests place workers at unwarranted risk of loss of employment and personal reputation.

In conclusion, the IBEW believes good management and in-house security programs can far surpass any type of polygraph test. The submission of workers to lie detector testing is an outrageous violation of personal privacy, and such practices should be prohibited by federal law for all persons.

All employers, whether in the public or private sector, should realize that polygraphs are not a tool that will generate loyal and trustworthy employees. Just the opposite can be the result.

Since the IBEW feels Lie Detectors have proven to be unreliable and can be used for unjust persecution of employees, we feel their use should be prohibited by all employees in the private sector as well as Federal, State, and Local government. The only possible exception would be an exemption for those employees in the Federal sector involved in sensitive duties such as the FBI, CIA, NSA, etc. The IBEW supports the efforts of the Senate Labor and Human Resources Committee to introduce legislation to prohibit the use of polygraphys in the workplace, as we support H.R. 1212 as introduced on February 24, 1987, with the exception of Section 6 dealing with the exemption for governmental employers as presently written.

June 19, 1987
Hearing Rm. 430
Dirksen Senate Office Building
10:00 A.M.
United States Senate
Washington, D.C. 20510

Statement of the National Association of Showroom Merchandisers (NACSM) in Opposition to H.R. 1212, and in Support of H.R. 1536 A Bill to Set Minimum Standards for the Use of Polygraph Examinations for Employment Purposes.

The U.S. Senate Committee on Labor & Human Resources

The National Association of Catalog Showroom Merchandisers ("NACSM"), a trade association representing approximately 2,000 discount retail stores with billions of dollars in annual sales, respectfully requests that this statement be included in the public record of the polygraph hearings.

NACSM supports a bill to set minimum standards and to regulate the use of polygraph examinations for employment purposes, as is encouraged on H.R. 1536. NACSM opposes any bill which would impose an outright ban on such tests for all industry (such as H.R. 1212).

We hope it is helpful to the Committee to bring to your attention several points.

First, and at the outset, we wish to emphasize a concern of a wide variety of institutions that the language of any regulatory bill not be broadly written to encompass any written tests used for pre-employment interviews.

Second, we believe there is wide support for a regulatory bill that sets minimum standards for the limited use of polygraph examintions, but we believe there is grave concern and widespread

opposition to a bill that would constitute an outright prohibition in the private sector. This is inappropriate since the use of polygraph in the public sector was recently endorsed by the Congress for the U.S. Defense Department which belies critics' claims of gross inaccuracies. Simply put, if polygraph can be accurate for government agency use, it can be made accurate for private sector needs. To the extent a minimum standards bill meets these needs, the catalog showroom industry fully supports it.

On the subject of the use of polygraph it may be useful to reflect back upon the 1960's and judicial modifications to the right to counsel in criminal proceedings. It was suggested that the ideal would be to counsel not to commit the crime. This parallel is offered to emphasize the point that if the discreet use of polygraph examinations not only serves the critical needs of industry, and promotes peer respect, but even a person who at moment would be a thief, may be well served by being dissuaded from a regrettable step.

Background

Catalog showrooms, as discount retailers, sell billions of dollars of high priced jewelry which is highly susceptible to theft.

A just released study by Arthur Young & Co. shows that forty two percent (42%) of product loss is from employee theft. A major factor in the success of the catalog showroom industry in generally keeping inventory shrinkage to less than one percent

(1%) of sales; this has largely been the result of a controlled use of polygraph examinations.

While we support a bill to regulate the use of polygraph examinations, outright prohibition would have serious adverse consequences for our entire society.

Company investigations are an essential ingredient of asset controll in our economy, and polygraph is an extremely useful tool in that endeavor. Many state courts permit the use of voluntary polygraph examinations as evidence in court cases, not only in criminal, but civil cases as well.

H.R. 1536 provides for the states' right to regulate polygraph, unless they fail to meet federal mandated minimum standards. Under this proposal no employment decision could be based on the refusal to take a polygraph examination, nor solely on the results of a polygraph examination. The minimum qualifications and training standards established under H.R. 1536, would give full notice to employees of their rights, including receipt of a copy of the report; waiver of rights would not be permitted under H.R. 1536.

An outright ban on the use of polygraph would have a major impact throughout our economy and our society which has not been fully measured. The adverse effect will be on a variety of victims, far beyond the billions of dollars which could be directly lost annually by the business sector.

The Need for Polygraph

There are a wide array of industries that utilize polygraph. The jewelry industry has staggering potential losses at stake, which is why virtually every trade association representing the jewelry industry opposes H.R. 1212. In addition to hundreds of millions of dollars of potential jewelry thefts, there are other serious issues of public safety and crime control. For example, the airlines and trucking industries are presently having serious problems with the unlawful transportation of illicit drugs. The pharmaceutical industry has similar problems with the theft of such drugs. The security and nursing and day care industries have other obvious safety problems. Staggering potential losses also exist for the securities and banking industries.

Nursing and child day care groups, pharmaceutical companies, truckers, bankers, the securities industry, retailers and jewelers have thus joined with catalog showrooms in raising the alarm of the potential consequences of H.R. 1212. We join, as end users, with the security and polygraph industries to express this grave concern.

Most losses are attributable to "in house" actions with large inventory shrinkage (far beyond outside losses) a crucial element in keeping total losses in balance is the existence of the possibility of the use of employment polygraph testing, and we would stress that the potentiality of such testing in and of itself serves a very valuable function. Conversely, the

elimination of the possibility of such testing, by itself, will have a negative impact which cannot now be calculated or appreciated.

It is access to polygraph, not the unreasonable use of polygraph that we support, as is the case of scores of businesses who have joined to support a sound regulatory bill such as H.R. 1536, which will protect the rights of the employee, as well as preserve polygraph use for responsible purposes.

There is nothing wrong with curbing abuse on the use of polygraph. To the extent that a law requires responsible users, we support that purpose. We respectfully request that the Committee and the Senate reject an approach which bans polygraph and adopt a regulation such as H.R. 1536 as the best alternative for the country.

Respectfully submitted,

National Association of
Catalog Showroom Merchandisers
by Richard Kelly, General Couynsel
RBK/tv

SECURITIES INDUSTRY ASSOCIATION

WASHINGTON OFFICE 1850 M Street, N.W., Washington, D.C. 20036 (202) 296-9410

June 26, 1987

Mr. Jay Harvey
Chief Labor Counsel
Committee on Labor and Human Resources
632 Senate Hart Office Building
Washington, D.C. 20510

Dear Mr. Harvey:

Enclosed is the submission of the Securities Industry Association in regard to the Committee's consideration of legislation which would ban the use of the polygraph in the private sector. We respectfully request that it be included in the record for the proceedings on June 19, 1987.

Financial institutions maintain consumers' most valued assets - their securities and deposits, and as we note in our testimony, the polygraph is an important tool in maintaining that security. In recognition of the importance of protecting consumers' securities and cash, Federal law requires broker/dealers to maintain the highest possible degree of security at their facilities. In light of this responsibility, and of the unique risks to which securities firms and other financial institutions are exposed, we urge the committee to exempt financial institutions from the reach of this legislation.

If you have any questions, please do not hesitate to call Jonathan Paret or myself at (202) 296-9410. Thank you for your consideration of this testimony.

Sincerely,

Donald J. Crawford
Senior Vice President and
Director of Government
Relations

DJC/mn
Enclosure

NEW YORK OFFICE 120 Broadway, New York, N.Y. 10271 (212) 608-1500

STATEMENT OF THE

SECURITIES INDUSTRY ASSOCIATION

BEFORE THE

SENATE COMMITTEE ON LABOR AND

HUMAN RESOURCES

JUNE 19, 1987

The Securities Industry Association appreciates this opportunity to comment before the Senate Committee on Labor and Human Resources on the use of the polygraph by private sector employers. The SIA represents more than 500 securities firms headquartered throughout North America. Collectively, these firms account for 90% of the securities business done in the United States and Canada.

During consideration of similar legislation in the Senate last year, Securities and Exchange Commission Chairman John Shad -- on behalf of the Commission -- argued for an exemption from this legislation for "those in the securities industry who have regular access to currency and negotiable securities." Mr. Shad noted that "[t]he sums involved aggregate in the trillions of dollars . . ." and that "[e]elimination of the polygraph in these areas can be expected to increase insurance premiums, defalcations and other expenses ultimately borne by the investing public."

We share that concern. Indeed, the risks presented by this legislation go beyond the very real prospect of increased theft of currency and negotiable securities, and extend to unauthorized electronic funds transfers and the myriad problems that attend breaches of security. Our member firms serve as

fiduciaries for literally billions of dollars of cash, checks, and securities. Employees have daily access to important confidential information. Protecting these assets demands that securities firms be permitted to use all available technical means, provided that they are used responsibly and fairly.

While it is not unknown for individual thefts to total into the millions of dollars, it is worth noting that more than the profits of the securities firms is at stake here. The securities industry is regulated extensively by both government agencies and self-regulatory organizations that carry a mandate to protect the investing public and the nation's securities market. Section 15A of the Securities Exchange Act of 1934 requires that the rules of the various industry regulatory agencies, such as the New York Stock Exchange and the National Association of Securities Dealers, be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade . . . and to protect investors and the public interest."

To this end, securities firms -- like other financial institutions -- are legally bound to high standards of accountability not required of other private sector industries. (See, e.g., SEC Rule 17f-2, which requires the fingerprinting of securities industry personnel as an aid in identifying persons with criminal resources; Rule 345 of the NYSE, which requires Members to "make a thorough inquiry into the previous record and reputation of persons whom they contemplate employing"; Rule 346 of the NYSE, which prohibits Members from associating with any person "who is known, or in

the exercise of reasonable care should be known, to be subject to any 'statutory disqualification'; and Rule 351 of the NYSE, which requires, among other things, the reporting of violations of laws or regulations to the Exchange.) The public interest in security at investment banking institutions and securities dealers is reflected in the fact that the Treasury Department is authorized to provide emergency loans of as much as $1 billion to the Securities Investor Protection Corporation, a non-profit corporation that protects customers of registered securities broker dealers.

The securities industry uses polygraph testing in pre-employment interviews for those who will have direct access to negotiable instruments, securities, or confidential information. We also use the polygraph in internal investigations of thefts, misappropriation of confidential information, and other wrongful acts, including the sending of false or unauthorized communications. These tests are not conducted arbitrarily or randomly. Indeed, the polygraph is reserved for the most serious investigations.

As an industry, our member firms are committed to preserving the privacy and civil rights of our employees and prospective employees. As we stated in testimony before this Committee last year, we are selective in our use of polygraph tests and follow careful guidelines when such tests are appropriate.

First, our member firms employ only experienced, reputable polygraph examiners.

Second, in both pre-employment interviews and internal investigations, the polygraph is <u>never</u> the sole determinant for

making a decision, but is only a tool used in those processes. Other factors in the hiring process include a face-to-face interview, a written application, reference checks, and and FBI report. Similarly, some of the measures taken to investigate wrongdoing include interviews, document research, and accounting trails. The polygraph is used only if it is warranted by the circumstances.

Third, the tests are administered selectively. In pre-employment, only those who will have access to negotiable instruments, checks, securities, and confidential information are tested. Most firms further limit polygraphs by never using the test as the first step in the hiring process. When used for investigatory purposes, the polygraph is used selectively and not on a dragnet basis.

Fourth, the questions asked during a polygraph exam are limited to the particular situation. In pre-employment interviews, the questions bear on the applicant's suitability for a sensitive job such as whether he or she has falsified employment application information, engaged in significant drug usage, or thefts from previous employers. Similarly, in an internal investigation, the questions are limited to the facts of the incident being investigated. In neither case is the polygraph a "fishing expedition." Moreover, the industry does not ask questions concerning personal matters such as religious beliefs, political or union opinions, racial views and sexual preferences and activities, and would not object to statutory safeguards along these lines.

Fifth, the tests are administered carefully and professionally. Before each examination, the polygrapher

reviews the questions with the subject as well as any problems the subject might have in answering them. During the examination, the subject is asked the exact questions that were reviewed previously. If, during the test, there is an unusual reaction in answering a question, the test may be stopped and the examiner will attempt to clear up the matter. After the exam, an attempt is made to resolve problematic answers, including retesting if warranted.

Finally, we feel obligated to respond to the canard that polygraph examinations are reserved for low-level employees and are never used on white collar workers or supervisors. The fact of the matter is that managers and other white collar workers have been polygraphed where circumstances warranted such action, both in pre-employment interviews as well as in the course of investigations. The decision to polygraph an employee or prospective employee turns on the employee's access or anticipated access to negotiable instruments, currency, or securities - not on the employee's rank. While it is true that more staff employees are polygraphed than managers, this is a function of the fact that there are more staff employees than managers in jobs that present the greatest opportunities for theft, not because of any arbitrary distinction between employees.

The industry does not claim that the polygraph is infallible, but only that it has proved to be an extremely valuable tool in verifying employment applications for positions of trust, and in the investigation of thefts and other wrongful acts. The polygraph is, of course, not the only

means employed by the securities industry in pre-employment screening, and in the investigation of wrongdoing. The industry uses the full complement of investigative tools, including fingerprinting, interviews, and other recognized investigative methods. The polygraph is used with caution, but when it is used it provides important information that can corroborate testimonial or circumstantial evidence, or that can signal the need to do additional research work to resolve an investigation or to confirm job histories. For these reasons, we urge the Committee to recommend the continued, responsible use of polygraph testing by financial institutions, both in pre-employment interviews as well as in investigations.

The legislation introduced by the House Committee on Education and Labor (H.R. 1212) includes exemptions for government employees, and the legislation passed by the House last year included exemptions for security guards, employees of nursing homes and day care centers, employees of drug stores and drug manufacturers with access to controlled substances, and employees of public utilities. Each exemption resulted from balancing the private interests of employees and prospective employees against the public interest. We submit that the public interest in the security of financial institutions demands that the securities industry be allowed continued use of the polygraph.

In this regard, we call your attention to the statement of Mr. Williams, author of H.R. 1212, on agreeing to last year's amendment to exempt security guard firms from the bill:

> ...[T]he reason we are willing to accept this amendment is because it is very necessary, in

> the judgment of the sponsor of the amendment as it is to the sponsor of the legislation, to establish symmetry between what we allow in the public sector in the way of polygraphing and what we allow in the private sector.
>
> ...Security guards who guard our nuclear power plants, our hydroelectric facilities, our huge shipments of Code A drugs, our negotiable securities, are guarding the health and safety of America, and we allow them to be polygraphed. Cong. Rec., daily ed., March 12, 1986, H1061 (emphasis supplied.)

That statement is no less true today than it was a year ago. Then, as now, concern over the theft of negotiable securities merits permitting the use of polygraph examinations by financial institutions. But it is insufficient to permit only guards to be polygraphed, since thefts can be achieved today in ways that can escape the purview of the most vigilant guard. Unauthorized electronic transactions present a growing and serious risk, and confidential information can be easily transmitted over the telephone. Most losses are not the result of robberies, but rather occur through the complicity and active involvement of a firm's own employees.

Permitting the polygraphing of security guards, therefore, is only a small beginning toward the goal of achieving real security. If meaningful security is to be provided at financial institutions, more is needed; at a minimum, the institutions must be allowed to polygraph all employees who have or will have access to negotiable instruments, securities, currency, or confidential information. The polygraph must also be permitted in the investigation of thefts, misappropriations of confidential information, and other wrongful acts. Of

course, this testing should be consistent with the technical and professional standards outlined above.1/

We very much appreciate this opportunity to present our views, and look forward to the opportunity of working with the Committee in the development of future legislation.

1/ While we have endeavored to enumerate the most serious security risks, we believe it would be ill-advised to limit an exemption arbitrarily to particular types of pre-employment or investigatory questioning. It would be difficult for example, to attempt to enumerate particular types of property, the theft or disappearance of which might justify the use of a polygraph as part of the internal investigation, especially where the theft or disappearance might be principally significant as evidence of a breakdown in the firms' system of internal controls. As is true in other areas of human affairs, a single act of dishonesty can have a debilitating effect on an organization that is out of all proportion to the value of what has been stolen.

COMMENTS OF

DONALD T. WILSON

DIRECTOR, GOVERNMENT RELATIONS

NATIONAL TIRE DEALERS AND RETREADERS ASSOCIATION, INC.

on the issue of

POLYGRAPHS IN THE WORKPLACE

Submitted to the

LABOR AND HUMAN RESOURCES COMMITTEE

of the

UNITED STATES SENATE

June 19,1987

June 19, 1987

Mr. Chairman:

My name is Donald Wilson. I am Director of Government Relations for the National Tire Dealers and Retreaders Association (NTDRA), a national non-profit trade association representing over 5,000 independent tire dealers and retreaders in all 50 states. NTDRA's members are engaged in the wholesale and retail distribution of automobile and truck tires, the retreading of tires, and the sale of automotive aftermarket services and related products.

I appreciate this opportunity to comment on behalf of NTDRA and its members in opposition to proposals which would prohibit private employers from using polygraphs. We commend you Mr. Chairman for convening hearings on this important issue. Hopefully, as a result of this hearing, members of this committee will have a better understanding of why it is important that private employers not be denied the opportunity to use polygraphs as one tool in the difficult task of screening prospective employees and in investigating employee misconduct.

Mr. Chairman, employee theft is a very serious problem throughout the business community. Various studies conducted for retailing groups such as the American Retail Federation and the National Association of Chain Drug Stores indicate that employee theft may add as much as 15% to the cost of consumer goods. Resulting losses in the retailing industry are estimated annually to be in the billions. Inventory losses are increasing and there is evidence that employee theft may be the leading cause.

Increasingly in recent years, some retailers have turned to the use of polygraphs to assist in the screening of prospective employees in an effort to reduce inventory losses due to employee theft. For many retailers, more careful preemployment screening, including the use of polygraphs, has produced measurable results.

It may also have produced abuses. In response to charges of abuse, an increasing number of states have moved to regulate the administering of polygraph tests. In light of responsive and responsible state action in this area there appears to be no compelling reason for a federal presence.

Supporters of this legislation argue forcefully that polygraphs are unreliable and therefore should be banned. They argue that the use of polygraphs constitute an impermissible invasion of an individual's rights.

This association does not have the expertise to attest to the reliabilty or lack of reliability of the polygraph. However, law enforcement agencies, the Department of Defense,

the CIA etc., have relied on the polygraph for years as a useful tool in their investigative and law enforcement efforts. Various studies have been conducted on the reliability of polygraphs and the results apparently range anywhere from 60% to 95% accurate. Is that accurate enough? Perhaps and perhaps not.

One thing is for certain. The proponents of legislation to prohibit the use of polygraphs by private employers apparently believe that polygraphs are sufficiently reliable to justify their use by public sector employers, but not reliable enough to justify their use by private sector employers. This incredible and wholly unjustifiable double standard should on its face be repugnant to this committee and indeed all members of Congress. Legislative proposals, such as the current House bill HR 1212, put forth by critics of polygraphs in the workplace would offer their "protections" only to employees in the private sector. Public sector employees would be denied similar protections.

It would appear that those who propose to deny private employers use of the polygraph are unwilling to put the nation's security at risk with their ideas but they are apparently more than willing to put at risk the economic security of the nation's business community. They are unwilling to put at risk public monies but they are willing to put at risk the livelihood of the small entrepreneur.

Mr. Chairman, the need for this legislation is suspect. The potential mischief it may do is virtually unlimited. Small businesses in particular may be harmed because they can least afford the economic losses this legislation may cause.

For employers in retailing and wholesaling concern is not simply with inventory losses. In many jurisdictions employers can be held liable under certain circumstances for the conduct of their employees. Surely an employer has the right to take all reasonable steps during preemployment screening to protect himself or herself from potential liability or from a job applicant with a past criminal record.

NTDRA does not oppose reasonable regulations governing the administration of polygraph tests. Individual states have and are taking steps to prevent the likelihood of abuses. We seriously question the need for Federal intervention in an area in which state legislatures are fully competent to deal with any problems or abuses which may arise. However, if members of Congess believe a federal presence is imperative in this area, we urge this commttee to give consideration to various proposals which have been offered which would provide guidelines for the administering of polygraph tests such as HR 1536 introduced in the other body by Congressman Young of Florida.

Mr. Chairman, from the parochial point of view of the retailer, wholesaler, and manufacturer inventory losses, potential liability problems, and the economic viability of

their business are of paramount concern. This committee, however, must obviously concern itself with individual rights. And perhaps it is in this area that the proposals we have seen to ban the use of the polygraph in the private sector are so tragically flawed. They seek to subordinate rights of an employer to the rights of the employee. They seek to provide "protections" to private sector employees that are not extended to public sector employees. They do not extend the protection of the law equally. For that reason alone, they should not be adopted.

Again Mr. Chairman we thank you for the opportunity to share with you and the members of this committee the views of NTDRA and its membership on this important issue of polygraphs in the workplace.

American Pharmaceutical Association
APhA
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(202) 628-4410
The National Professional Society of Pharmacists

John F. Schlegel, PharmD
President

D. Stephen Crawford
Chairman of the Board

June 29, 1987

The Honorable Edward Kennedy
U.S. Senate
Wasnington, DC 20510

Dear Senator Kennedy:

The American Pharmaceutical Association (APhA), the national professional society of pharmacists, urges your support for a ban on polygraph tests by employers in the private sector. A hearing held by the Committee on Labor and Human Resources on June 19 clearly demonstrated the need for federal legislation to protect employees from inaccurate polygraph testing.

In the House of Representatives, the Committee on Education and Labor favorably reported out the Employee Polygraph Protection Act (H.R. 1212) on June 10. H.R. 1212 would prohibit the use of polygraph tests in the private sector workplace. In its consideration of the bill, the committee defeated discriminatory amendments which would have exempted pharmaceutical interests and others from the polygraph ban.

APhA's position is that polygraph tests should not be used as a means of pre-employment screening in pharmacies; should not be used in pharmacies for routine "security" checking of employees; and should not be used in pharmacies in the course of investigations for cause.

APhA recognizes the problem of internal theft and is aware of efforts to curb this problem through the use of polygraph tests. However, we hold that the use of polygraph tests is inappropriate because of serious issues regarding reliability of the tests, the competency of polygraph examiners, and control and use of test results. The use of polygraph tests also raises constitutional and invasion of privacy issues.

In short, there is not satisfactory scientific evidence to show that polygraph tests detect deceptive behavior. Thus, APhA urges you to support the introduction and adoption of legislation in the Senate which would prohibit polygraph testing by employers in pharmacies and other parts of the private sector.

Thank you for the opportunity to provide these comments.

Sincerely,

John Schlegel

JFS/kac

Georgia State Employees Association

Local 1985, Service Employees International Union, AFL-CIO, CLC
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TESTIMONY TO UNITED STATES SENATE COMMITTEE

ON LABOR AND HUMAN RESOURCES

ABUSE OF POLYGRAPH EXAMS IN PUBLIC EMPLOYMENT IN THE SOUTHERN UNITED STATES

SUBMITTED BY: Stewart Acuff and GSEA Local 1985
of the Service Employees International Union, AFL-CIO
July 1, 1987

One of the most serious abuses caused by polygraph exams is the termination of long term, quality employees who built their careers and their families futures around a particular job and employer. Too many times, particularly in public employment in the South, polygraph exams are used when doubt has been cast, and perfectly good workers lose their livelihood.

In many southern states, including Georgia, collective bargaining is illegal for public employees,. Without a contract or even a collective bargaining process public employees and their unions cannot protect themselves from polygraph exams. Any polygraph legislation should absolutely include State, County and City employees.

Our union is now trying to win back the jobs of five good, longterm employees at Central State Hospital in Milledgeville who have lost their jobs partly because of unfair polygraph procedures. Seven black women who had seniority ranging between eighteen months and 16 years were accused of patient abuse by a temporary white employee who had just 6 weeks seniority. All seven accused workers had practically spotless records with superior or better work ratings and no history of previous patient abuse.

These seven women had police officers deliver notices of polygraph exam to their homes with attendant embarrassment and no notification of their rights under state law in regard to the exams . Our union attorney advised these women not to take the exams until she had seen proof of certification of the examiner and the list of questions. The hospital never provided either and used their refusal to take the exams immediately as one reason for the dismissal of five of the employees. When charges of abuse were dropped against the other two their refusal to take the polygraph exam when demanded by the hospital was used to charge them with insubordination and as a reason to suspend them for three days without pay.

The white woman who made the charges took a polygraph exam several days later and passed it.

Had the roles been reversed and one black temporary worker had made the charges against seven quality, longterm, white employees the hospital would have never pursued the charges.

The polygraph exam was used in this instance as a tool in a racist fishing expedition to deprive five quality, longterm, black employees of their careers, their livelihoods and their reputations.

Please include public employees in any legislation to outlaw the use of polygraphs in the workplace. Thank you. We stand ready to provide more testimony if requested by this honorable committee or its counterpart in the House of Representatives.

• Movies 9B
• TV Schedule 9B
• Comics 10B

Piedmont

Section B

Disciplined CSH workers say they're innocent

By Don Schanche Jr.
Macon Telegraph and News

MILLEDGEVILLE — Seven black women who were fired or suspended this month from their jobs at Central State Hospital because of alleged resident abuse or insubordination went public Wednesday to say they are innocent.

The women, along with officials of the Georgia State Employees Association, said during a news conference that the job actions stemmed from racial prejudice. They said Central State disciplines black employees more harshly than it does whites. A hospital official, contacted after the news conference, denied the charge.

The seven women, all of whom worked on the fourth floor, west wing of the Allen Building, are Dorothy Archer; Debbie Dollar; Barbara Roberson; Carolyn Scott; Margaret Simmons; Aylinda Watson; and Leila Redding. Redding could not attend the news conference Wednesday because she had to work.

Watson and Redding were given three-day suspensions, beginning June 7. The other five women were fired June 5.

All seven women were health services technicians, with varying degrees of seniority, when the charges were filed in early May. Watson and Redding retained their jobs after their suspensions. All the women had worked at the hospital for several years. Watson is a 13-year veteran and Simmons has worked there 14 years.

DON SCHANCHE JR./Macon Telegraph and News

From left, Dorothy Archer, Carolyn Scott, Margaret Simmons and Barbara Roberson say they're victims of prejudice

The five fired women lost their jobs over charges that they abused mentally retarded residents under their care in the Allen Building. The two suspensions resulted from Watson and Redding's refusal to take a lie-detector test during an investigation of the alleged abuse.

"All of us have been falsely accused of doing these things," Watson said. "We are completely innocent of these charges. ... We are just really upset about what's happened to us."

The hospital, the GSEA and the employees themselves had withheld the names of the disciplined women until Wednesday. Stewart Acuff, executive director of the GSEA, said the women decided to go public to salvage their reputations.

He said they had hoped to win their appeals before hospital management, and to be exonerated.

"When it became clear that that wouldn't be the case — that they would have to go on the offensive to protect themselves — that's why they agreed to do the news conference," he said.

The women gave news reporters copies of disciplinary letters they received from William K. Killion, director of the Developmental Disabilities Division at Central State Hospital. The letters include these charges of abuse:

• Archer allegedly slapped a female resident and pushed her to the floor on April 28 and on other occa-

(See CSH, page 10B)

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CSH From page 1B

sions used undue force in pushing the resident into a hard plastic chair. She also is charged with lying down on a resident's bed while on duty.

● On April 27 in the Allen 4-West dining room, Dollar allegedly slapped a resident, shoved her and "forcefully" pushed her into a chair.

● Roberson was charged with kicking a female resident on numerous, unspecified occasions while the resident sat on the floor. She also allegedly struck the resident with a hair brush and allegedly struck another resident with her hand.

● Scott allegedly knocked a female resident to the floor three times on April 27 and at other times kicked a female resident as she lay on the floor and struck the same resident on the arms, legs and back.

● Simmons allegedly struck two residents with a hairbrush on numerous, unspecified occasions.

Dollar, Roberson and Scott also are charged with eating food intended for residents.

Acuff and the women at the news conference said some charges were changed between the time they were filed and the time the final disciplinary action was taken. He said the April 27 incident in the Allen 4-West dining room supposedly happened in front of many people, yet only one person claims to have seen it. He said Scott and Roberson did not even work with a resident they each are accused of abusing.

All seven women were charged with insubordination for refusing to take a polygraph test. The two women who were suspended received lighter discipline than the other five because the sole charge against them consisted of their refusal to take the lie-detector test.

GSEA attorney Carolyn Frazier, who also attended the news conference, said the women did not refuse to take the test altogether. She said they followed her advice not to take it when ordered to do so, because she was still researching their legal rights.

Frazier said they would be willing to take the test now, if it were given strictly according to state law.

Frazier said she had examined the women's work records — released to her by the hospital with the employees' permission — and they showed no signs of chronic patient abuse.

Killion's letters to the women do refer, however, to unspecified past acts of negligence by Archer and Dollar, and unauthorized job absences by Simmons.

Acuff and the women at the news conference said the charges were leveled by a temporary, white female employee at the Allen Building. They alleged that the woman made the charges out of spite because she failed to receive a permanent job that was given to a black employee.

They also charged that the woman admitted during a personnel hearing that she had committed some form of patient abuse but that she was not disciplined.

A source at Central State Hospital has said the woman who brought the charges passed a polygraph test, supporting her allegations of abuse against the seven women. Acuff, in response, questioned the validity of lie-detector tests in general.

Hospital spokeswoman Susan Rogers declined to answer any questions related to the person who brought the abuse charges.

But speaking of abuse in general, she said, "The hospital is always encouraging people to report any abuse they see. ... They need all the support we can give them for their courage in raising these issues."

Bill Watkins, president of the GSEA chapter at Central State, cited six recent instances in which he said white employees were found guilty during hospital personnel procedures of serious offenses but were treated less harshly than the black women.

He said a white maintenance man who was caught several years ago having sex with a retarded resident was fired then but recently rehired by the hospital. Rogers said that she is unaware of such a case but that if the man was rehired, he should not have been.

Watkins also charged that little or no action was taken when a white supervisor came on duty drunk; when a white supervisor covered up a case in which a patient was injured when he was hit by a bus; when a white nurse and white police officer each hit a mentally retarded resident last October; and when a white psychologist was found guilty of resident abuse last March.

Rogers said she was unaware of those cases either. But she denied that the hospital uses a double standard in disciplining white and black employees.

"Our position is, there are not two standards," she said. "There is one standard for all employees, depending on two things: one, the offense and two, their record."

All the women have appealed the actions taken against them. They are scheduled to face Merit System hearings next month.

Statement of the Multi-Housing Laundry Association
for the record of the oversight hearing on
use of polygraphs in the workplace
Senate Committee on Labor and Human Resources

June 17, 1987

Statement of the Multi-Housing Laundry Association
for the record of the oversight hearing on
use of polygraphs in the workplace

The Multi-Laundry Housing Association (MLA) appreciates the opportunity to testify for the record on use of polygraphs in the workplace. MLA asks this Committee not to consider any legislative proposals that would unreasonably restrict the reasonable and fair use of polygraphs in the workplace.

To provide the proper context for our comments, we provide a brief description of our industry. The multi-housing laundry industry operates laundry facilities in all types of multi-family residences. The industry's members, known as "route operators," purchase and install laundry room equipment, collect the coins paid into the machines, and service the machines. In exchange for the right to operate the laundry room, they provide the owner of the housing with a substantial portion of the gross income received. MLA has 155 members, including 4 in Massachusetts.

Virtually all of the route operators' income consists of the coins placed in laundry machines. The coins must be collected, brought to the route operator's office, counted, separated into units of appropriate size, and taken to a bank for processing and deposit. At every step, particularly the first two, route operators are extremely vulnerable to theft. They are even more

vulnerable than other businesses that deal in cash, such as retailers, because collection takes place at far-flung, unsupervised sites where it is impossible to monitor the actions of the collecting employee.

Our members must use effective methods of controlling employee theft. The very survival of their businesses depends on this. Also, their contracts with the housing owners require that the owners receive a certain percentage of the income collected, and our members need to assure these owners that their share is not being unreasonably reduced due to theft.

In order to deal with these complex problems, many of our members use polygraph tests as one way of controlling theft. Tests are most frequently used as a tool to screen job applicants, and some route operators also use polygraph tests as a periodic check on their employees. As a pre-screening tool, the tests are used almost exclusively to test prospective employees for problems relating to theft -- a history of theft from prior employers or of shoplifting, for example. Some operators also use the tests to check for other problems that could significantly affect job performance -- such as a history of drug or alcohol abuse. Finally, some route operators use polygraph tests to check the accuracy of responses on the written application.

We would like to make several points about our members' use of polygraph tests. First, particularly in the pre-screening context, these tests are only one tool of several that route operators use to evaluate the reliability of employees and prospective employees. Most operators use detailed written applications, which include employment history and references. They also interview the applicant extensively without use of the polygraph.

Second, our members do not use polygraph tests as a means of invading employees' privacy. They do not inquire into such matters as religious or political beliefs, or sexual preference.

Third, our members recognize the importance of using reputable, highly-trained examiners and state-of-the-art equipment. As a typical example, one of MLA's officers uses the president of his state's polygraph association as his examiner.

For the members of our industry, polygraph tests are an effective tool which they use in a responsible and fair way. We are therefore most concerned that H.R.1212 would forbid our members to use polygraph tests. This bill ignores what our members know to be true from their own experience -- namely, that when used for proper purposes by a qualified examiner, polygraph tests are very useful employment tools that do not invade privacy.

MLA members believe that regulation of the use of polygraphs should be left to the states. State governments are the best qualified to tailor such regulations to the unique business conditions within their jurisdictions.

However, if the Committee decides to report a bill to give the federal government a role in polygraph regulation, that bill should not ban use of polygraphs outright. We recommend a bill similar to H.R.1536, introduced by Congressman Young (R.-Fla.). This bill would regulate polygraph tests and prohibit invasions of privacy while permitting employers to use the tests to protect their businesses and control property loss attributable to employee theft and other acts of misconduct. The bill would set minimum standards for polygraph examiners, examinations, and equipment, and would impose safeguards designed to protect privacy and inform employees of their rights. It would permit both employees and the Secretary of Labor to bring enforcement actions.

When they are used properly and fairly, polygraph tests are a valuable tool for American business. They provide important protection from losses due to employee theft. If their use is prohibited, there would be severe financial consequences for the multi-housing laundry industry. We urge this Committee, if it reports a bill, to report a bill similar to H.R.1536.

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STATEMENT OF

WILLIAM H. WYNN
INTERNATIONAL PRESIDENT
UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION

AND

ROBERT F. HARBRANT
PRESIDENT
FOOD & ALLIED SERVICE TRADES DEPARTMENT, AFL-CIO

before the

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

ON THE ABUSE OF "LIE DETECTORS" IN EMPLOYMENT

June 19, 1987

Thank you, Mr. Chairman, for the opportunity to add our views to the permanent record of this hearing on the abuse of so-called "lie detector" tests in employment. I am William H. Wynn, International President of the United Food and Commercial Workers International Union (AFL-CIO). I am pleased to submit this statement to the Labor and Human Resources Committee on behalf of the United Food and Commercial Workers International Union (UFCW), and on behalf of Robert F. Harbrant, President of the Food and Allied Service Trades (FAST) Department, AFL-CIO.

The UFCW represents 1.3 million members organized in 700 local unions throughout the United States and Canada. The UFCW and its local unions have contracts with tens of thousands of employers in food processing, retail sales, leather and shoe manufacturing, and other industries.

FAST represents sixteen national and international unions, with a membership of more than 3½ million working men and women employed primarily in the service sector of the economy.

We strongly support legislation to end the abuse of intimidating, intrusive and inaccurate "lie detector" tests in America's workplaces.

Our statement is divided into five parts. Part I is a brief summary of our statement. Part II deals with the employment and law enforcement use of polygraphs. Part III gives an overview of federal legislative efforts to prohibit or limit polygraph use and also reviews the status of state limitations and prohibitions. Part IV is a survey of field and laboratory studies of the validity of polygraph testing, and part V reviews the growing use and abuse of other so-called "lie-detectors" -- the voice analyzers.

I. SUMMARY

Americans are subjected to over two million polygraph examinations every year. Although the Constitution and the courts protect American citizens against polygraphs in the hands of law enforcement officials, American workers and employment applicants still have no Federal Government protection against polygraph machines in the hands of private employers. The result is that private employers are responsible for more polygraph examinations every year than either criminal justice investigators or the Federal Government.

Workers and job applicants who submit to polygraph examinations are frequently asked about family problems, levels of job satisfaction, sexual preferences, intended length of stay on the job, personal finances, drinking habits, sexual activities,

political beliefs, marital relations, and union activities. Polygraphs may also be used to force employees to inform on their fellow workers and to discriminate on the basis of race and sex.

Unfortunately, many workers and job seekers feel compelled to answer all of the polygrapher's questions because they know that refusal to answer (or refusal to submit to the examination at all) can mean the loss of a job. And though a person who is strapped to a polygraph machine may at least in theory have the right to remain silent, the polygraph detects physiological changes caused by human emotions, robbing even an honest person of the right to refuse to answer an insulting or embarrassing question.

Employers who use the polygraph claim it reduces employee crime. However, according to the non-partisan Congressional Office of Technology Assessment (O.T.A.), no formal cost-benefit analyses appear to have been done which support that claim, and there is no research on the predictive validity of polygraphs to justify their use to screen out potentially dishonest employees. Moreover, an exhaustive study by John P. Clark and Richard C. Hollinger of the University of Minnesota for the U.S. Department of Justice's National Institute of Justice entitled "Theft by Employees in Work Organizations," concluded: "...assessing previous theft activity outside of the work setting (by using polygraph exams) has little relevance to future workplace behavior."

Employers use the polygraph because they believe it is cheaper and faster than other methods of checking employment applications or controlling employee theft. To employers, the polygraph is not a necessity, it is simply a tool of convenience.

From the 93rd Congress through the 99th Congress, over forty bills were introduced concerning the use of polygraphs, mostly couched in terms of privacy and constitutional rights. In the 99th Congress, legislation to prevent the denial of employment opportunities caused by the use of "lie detector" tests in private sector workplaces was introduced in both the Senate and the House of Representatives. The Senate bill was introduced by you, Mr. Chairman, and Senator Orrin G. Hatch, who was then Chairman of the Labor and Human Resources Committee. The House bill was introduced by Representative Pat Williams of Montana.

Representative Williams' legislation passed the House of Representatives on March 12, 1986, on a strong, bipartisan vote of 236-173. It was the first time a polygraph bill ever succeeded in either Chamber of the Congress. Unfortunately, the 99th Congress ended before the Senate bill reached the Senate floor.

Representative Williams has reintroduced the Polygraph Protection Act (H.R. 1212) this year, and the bill has again received the bipartisan support necessary to move expeditiously through the legislative process. H.R. 1212 is cosponsored by more than 175 Members of Congress.

We strongly support legislation to end the abuse of so-called "lie detectors" in employment. The use of "lie detectors" is an insiduous employment practice which wrongfully denies job opportunities to hundreds of thousands of workers every year. Businesses that use the devices do not really need to do so. Twenty-one states already ban or restrict the use of polygraphs in employment, and yet employers are still able to run profitable businesses and hire honest and capable employees in those states.

State statutes generally seek to protect employees and applicants for employment from being required to take lie detector examinations. But half the states which forbid an employer to require a lie detector examination allow an employer to solicit or request the same examination - allowing an employer the right to pressure employees and job applicants with the implicit threat of the loss of employment for those who refuse to avail themselves of the "opportunity" to take the test.

Other states have forbidden employers to either require or request employees and prospective employees to take lie detector examinations, but even these states allow employees and job applicants to "voluntarily" take lie detector examinations. Unfortunately for these "volunteers," lie detectors are as likely to condemn a truthful person as they are to clear him.

State prohibitions and restrictions are inherently inadequate. Many employers skirt state law by simply sending job applicants and employees to be polygraphed in neighboring states with no "lie detector" restrictions.

Thirty-one states have imposed various licensing requirements for polygraphers, either as the sole legal protection against "lie detector" abuse or in conjunction with other provisions. But the dangers of "lie detectors" result from much more than the qualifications of the individuals who administer the tests. The danger, and the irony, of polygraph licensing statutes is that they legitimize the machines, their operators and the entire pseudo-scientific process of "lie detecting," causing an even greater use of these machines in the workplace.

Considering the extent to which polygraphs are used by private employers, government, and law enforcement agencies, surprisingly little serious research has been done on polygraph validity (that is, whether polygraphs can in fact distinguish truth from deception), particularly as polygraphs are used by business. The results of polygraph validity studies vary from 55% incorrect identifications (or less accurate than dumb chance) to 3% incorrect. The studies show the polygraph is particularly inaccurate in judging innocent people.

Private employers use polygraphs extensively in screening situations, both to screen applicants for employment and to screen large numbers of employees during investigations of suspected

employee theft. However, O.T.A. has determined that the mathematical chance of false positives (that is, incorrectly classifying an innocent person as deceptive) is highest when the polygraph is used for screening purposes. The reason for this, according to O.T.A., is that in most screening situations only a very small percentage of the screened individuals are guilty.

Thus, according to O.T.A., if typically one out of a thousand people is guilty, and we assume the polygraph is 99% accurate (an extremely high accuracy level which even the staunchest polygraph supporter could not defend) then the law of probability would result in one guilty person being correctly identified as guilty, but ten innocent people would be wrongly classified as guilty. Given the results of studies showing accuracy rates much lower than 99% (Horvath, 1977=64%; Kleinmuntz and Szucko, 1982=73%), the negative impact of polygraph screening on innocent and truthful individuals is in reality probably far greater than in the hypothetical above, and the consequences are all the more disturbing.

The root flaw of all "lie detectors" is that there is no physiological response specifically and exclusively associated with lying -- there is no such thing as a "lying response." Many different factors and conditions can affect the outcome of a polygraph examination and cause an honest person to be labeled a liar, or cause a dishonest person to escape detection. Physiological abnormalities such as blood pressure problems, heart conditions, colds and headaches can affect the outcome of the examination. Fatigue, drugs, alcohol and body movements can also affect the polygraph.

Despite all the evidence of the serious limitations of the polygraph and the examiners who use them, over two million polygraph examinations are administered in the United States every year. Mathematical calculation of error rates and misclassification, applied on a national scale, translates into lost employment and lost employment opportunities numbering in the hundreds of thousands annually.

Such high social and economic costs indicate the need for a national policy to end the abuse of so-called "lie detectors" in employment. We urge the Committee to take strong and effective action to end the abuse of "lie detectors" in the workplace, so workers may regain the dignity and self-respect they deserve.

II. USE OF THE POLYGRAPH

Introduction

The polygraph is the result of a combination of devices invented for medical and scientific purposes. The principal components of the standard polygraph (the blood pressure cuff, pneumatic chest tube, and galvanic skin response indicator) were invented to further medical knowledge and facilitate medical diagnoses. Their inventors claimed nothing more than that their devices could measure certain physiological actions.

In 1895, however, an Italian psychiatrist and criminologist named Cesare Lombroso claimed he could detect a lie by measuring the changes in a person's blood pressure (Lombroso, incidentally, also claimed "criminal types" could be distinguished by certain physical characteristics, including the shape of the skull). Others followed Lombroso's lead, and by 1926 the basic polygraph was complete.

The standard polygraph has three parts: a blood pressure cuff, a galvanic skin response indicator, and a pneumatic chest tube. The blood pressure cuff is attached to a person's upper arm to record changes in blood pressure. The galvanic skin response indicator measures changes in the skin's electrical conductivity, which increases when a person perspires. It consists of two electrodes which are attached to the index and second fingers of one hand. The pneumatic chest tube is strapped around a person's chest to measure changes in breathing pattern.

Other components are sometimes added to the standard polygraph. For example, some polygraphs include a pneumatic tube which is stretched around a person's throat to gauge swallowing, contractions of the throat, and voice muscle tension. Some of the most "sophisticated" polygraphs can be connected to chairs with seats and arm rests wired to detect muscle pressure and body movements.

The use of polygraphs has quadrupled in the last ten years. Americans are subjected to over two million polygraph examinations every year, and the vast majority of those examinations are administered to workers and job applicants. The growing problem of polygraph and other so-called "lie detector" testing has been treated as a constitutional issue, a privacy issue, and a civil rights issue. But the single most common use of the polygraph is in employment, and the problem has become, first and foremost, one of employment opportunities.

Polygraphs have become vehicles for employee intimidation and for screening out employees of political or union beliefs different from those of a particular manager. Jobs are too important, and in today's economy too scarce, to allow an inaccurate machine to dictate the employment fate of hundreds of thousands of Americans.

Employment Use

Though the Constitution and the courts protect American citizens against polygraph machines in the hands of law enforcement officials, American workers enjoy no protection by the Federal Government against polygraph machines in the hands of private employers. As a result, private employers are responsible for more polygraph examinations every year than either criminal justice investigators or the Federal Government. (Office of Technology Assessment, O.T.A., Study, p. 23).

Polygraphs are used by a variety of businesses. But they are particularly popular in businesses where the risk of theft and fraud are high and employee turnover is high. (O.T.A. Study, p. 25). For example, banks and investment firms, mail order houses, discount shops, restaurants, clothing and shoe stores, supermarkets and department stores are all heavy users of polygraphs because employees in those businesses handle large sums of money.

In a survey of four-hundred major U.S. corporations, Belt and Holden of the Wichita State University College of Business Administration found that fifty percent of the commercial banks and fifty percent of the retailers that responded to their survey reported using polygraphs, and these businesses are also more likely to test all job applicants and employees instead of just a sampling. (Belt and Holden, p. 86).

The list of businesses that subject their employees to polygraph examinations covers the whole spectrum of American business. Electronic and chemical companies use polygraphs because they produce expensive products and worry about industrial espionage. Drug and liquor manufacturers, hospitals and doctors' offices use polygraphs to prevent the theft of narcotics, alcohol, and other federally regulated products. Every type of business has found a use for polygraphing employees: copper refiners, rubber manufacturers, nursing homes, public utilities, delivery companies, steel producers, freight movers, meat packers, and food and oil processors.

Belt and Holden found that 34.5% of the companies that reported using the polygraph use it in periodic surveys of employee honesty, and 34.5% use polygraphs for employment application verification. Of the companies that reported using polygraphs, 89% use them in cases of specific thefts or other irregularities.

One of the most disturbing aspects of the use of polygraphs by employers is the unlimited range of questions employees are expected to answer when they are strapped to a machine. Employees and job applicants who have undergone polygraph examinations have been asked about family problems, levels of job satisfaction, sexual preferences, whether the employee has ever been tempted to steal, intended length of stay on the job, personal finances,

drinking habits, sexual activities, political beliefs, and marital relations. (O.T.A. Study, p. 32).

Many unions have reported cases in which polygraphs have been used to quiz employees on their union activities, in violation of federal labor law. Polygraphs may also be used to force employees to inform on their fellow employees and to discriminate on the basis of race and sex. (O.T.A. Study, p. 31).

One person's testimony before the Labor-Management Subcommittee of the House Committee on Education and Labor shows how employers can use the polygraph to explore the private lives of their employees and prospective employees:

> During the test, he asked me if I'd ever stolen from an employer and what the dollar value was. He asked me questions, if I had sex with my wife the night before. And I told him that was none of his business. He just said, "Just answer yes or no." He asked me if I had a girlfriend, and I again told him that I didn't think it was any of his business. And he was getting a little bit mad at me for not just answering yes or no, and he began telling me again, "just answer the questions yes or no."
>
> And so he asked me also if I liked extramarital sex, and I again told him this was none of his business. Before he could jump in and interrupt me and tell me just to answer yes or no, I told him, "Well, I guess I don't have a girlfriend, so I guess I'm not involved in extramarital sex!" His attitude was a little hostile.
>
> And he told me that it was up to him whether I was hired or not at Coors Co., and that got my dander up...
>
> When I finished the test, I felt degraded, and I was disgusted and mad and just darn glad to be off it. And I also told him that he'd never get me in one of those things again. He won't. (Haze, Vol. III, 40). (Pressures In Today's Workplace, pp. 16-17).

Unfortunately, many workers and job seekers feel compelled to answer all of the polygraph examiner's questions because they know that refusal to answer a question (or refusal to take the examination at all) can mean the loss of a job.

Some of the reasons employers give for using polygraphs to screen job applicants are:

To verify the truth of employment applications
To eliminate potential claims for unemployment insurance, workmen's compensation and disability benefits
To reduce employee turnover
To screen out potential thieves
To prevent industrial espionage
To reveal undetected crimes

Employers who use the polygraph for on-going surveillance of their employees give these reasons for doing so:

To keep workers honest
To promote better employer-employee relations
To rehabilitate valued employees whose larceny could otherwise cost them their jobs
To increase savings and provide larger employee benefits
To lower the cost of bonding employees
To protect innocent employees
To screen out misfits

Employers who use the polygraph claim they need it to combat employee theft. Even well-meaning employers have been duped into believing that the polygraph is a fast, cheap and easy solution of their problems. However, according to the Congressional Office of Technology Assessment, there do not appear to be any formal cost-benefit analyses which show the use of polygraphs reduces employee crime, and no research has been done on the predictive validity of the polygraph. (O.T.A. Study, p. 31).

In addition, a comprehensive examination of employee theft by John P. Clark of the University of Minnesota and Richard C. Hollinger, commissioned by the U.S. Department of Justice's National Institute of Justice, concluded: "...assessing previous theft activity outside of the work setting (by using polygraph exams) has little relevance to future workplace behavior. However, checking on one's previous pattern of employment history and dedication to a former employer are probably much better indicators." (Clark and Hollinger, p. 38).

Estimates of employee theft (which are used to justify use of the polygraph) vary widely, and seem to depend more on the motives of the estimators than on any objective collection and analysis of credible data. The National Retail Merchants Association, for example, claims that employees in their member companies alone steal forty billion dollars every year from their employers. ("Business Buys the Lie Detector," p. 101).

However, the United States Department of Commerce estimated that "inventory shrinkage" (used as a measure of all crimes against business) for all businesses totaled $26.2 billion in 1976. (Clark and Hollinger, p. 4). Inventory shrinkage, however, represents <u>all</u> inventory losses to business, and employee theft is only one of many sources of inventory shrinkage. As Clark and Hollinger point out:

> . . .even if one can arrive at an exact inventory shrinkage figure (usually expressed as a percent of total sales), the proportion of the figure which is attributable solely to employee theft remains intertwined with other confounding sources of loss. Factors such as clerical and billing errors,

> conventional thefts and shoplifting also contribute to the total inventory shrinkage level. Most inventory control experts will privately admit that parceling out the effect of employee theft from these other alternative sources of shrinkage virtually has been an impossible task. (Id., pp. 4 and 6).

The Congressional Office of Technology Assessment cites an estimate of ten billion dollars for "internal crime" in private industry annually. (O.T.A. Study, p. 31). But even that figure may exaggerate the extent of employee theft, since "internal crime" presumably encompasses other acts as well. American Management Associations estimates that employee pilferage probably ranges from five to ten billion dollars a year. (Clark and Hollinger, p. 5).

None of these figures represent anything more than mere guesstimates, and those who wish to justify polygraphing employees have more reason than others to exaggerate the figures. As Clark and Hollinger point out: "Despite the fact that employee theft is generally viewed as a problem of significant consequence, little reliable data exist regarding the phenomenon. The economic impact figures. . .seldom go beyond the level of alarmist rhetoric." (Id., p. 6).

Employers use the polygraph because they believe it is cheaper and faster than other methods of checking employment applications or controlling employee theft. The polygraph may be a dreaded machine to American workers, but to their employers it is simply a tool of convenience. According to Belt and Holden's survey of major U.S. Corporations, polygraph users rated efficiency first and moral or ethical considerations last among their reasons for using the polygraph. (O.T.A. Study, p. 31).

In contrast, those corporations which do <u>not</u> use polygraphs cited moral or ethical implications, validity and reliability considerations, cost, and the belief that polygraphs are unnecessary and inappropriate in the business setting, as <u>their</u> reasons for not using the polygraph. (Belt and Holden, p. 86).

Companies which use polygraphs on their employees are looking for a "quick fix." The problems which they hope to solve by resorting to the polygraph could be addressed through less objectionable (and probably more effective) means which would benefit both employers <u>and</u> employees. Clark and Hollinger suggest that factors such as fairness in employer-employee relations, ethical behavior by higher management, adequacy of communication, recognition of quality performance, and competence of supervisors may reduce theft among employees. (Clark and Hollinger, p. 25).

It is clearly possible to run a profitable business, even a retail business, without resorting to the polygraph -- J.C. Penney and Sears, Roebuck are among the many which do not use polygraphs,

because they know it is possible and preferable to make employment decisions and protect company assets by using less objectionable methods. (Pressure in Today's Workplace, pp. 18-19).

As Clark and Hollinger point out:

> More importantly to companies interested in reducing employee theft and counterproductive behavior is a sensitivity to the perceptions and attitudes of the workforce. . . . In short, we found that those employees who felt that their employers were genuinely concerned with the workers' best interests reported the least theft and deviance. When employees felt exploited by the company or their supervisors (who represent the company in the eyes of the employees), we were not surprised to find employees most involved in correcting this perception of inequity or injustice by acts against the organization. (Clark and Hollinger, p. 36).

Employers who need to protect company assets can effectively do so without the polygraph through a variety of means including:

good recordkeeping
attractive discounts for company products
a healthy organizational climate
loss prevention systems that protect assets without abusing employees
good management
senior management that is honest in its dealings with both employees and customers.

Likewise, employers can make effective employment decisions with careful interviewing procedures, clearly stated job requirements, and testing for specific job skills and talents. (Pressure in Today's Workplace, p. 19). Polygraphs are not an evil of necessity; they are simply convenient.

Law enforcement Use

Law enforcement agencies were among the first to use the polygraph, and to this day one of the major uses of the polygraph is for investigations by law enforcement agencies and private security forces in specific allegations of criminal acts. In these situations a polygraph is typically used only after a preliminary investigation has narrowed down a list of suspects, and it is used to question suspects about a specific incident or issue. (O.T.A. Study, p. 97). Typical cases in which polygraphs are used by law enforcement agencies include rape, kidnapping, and alleged illegal conduct by public officials. (Id., p. 25).

Courts have imposed restrictions on the use of polygraphs by law enforcement agencies, however, to protect individual constitutional rights. For example, a law enforcement agency cannot legally require a person to take a polygraph examination, and as a rule, the information gathered from an examination cannot be used as evidence in a judicial proceeding unless both the defendant and the prosecution agree -- and in some courts, not even then. (Pressures in Today's Workplace, p. 15).

III. FEDERAL AND STATE POLYGRAPH LEGISLATION

Federal Legislation

From the 93rd Congress to the present, over forty bills have been introduced relating to the use of polygraphs. Most of the bills which sought a prohibition of polygraph use did so couched in terms of constitutional rights and protection against the invasion of privacy. As a result, these bills invariably were referred to the Judiciary Committee, often with joint referral to the Education and Labor Committee in the House. Many of these bills sought to prohibit both Federal and private sector use, with a variety of exemptions for national security agencies and contractors.

By the 96th Congress, the proponents of private sector use of polygraphs began introducing "regulatory" legislation, designed to curb the abuse but not the use of polygraphs. By limiting the types of questions allowed, prescribing procedures and safeguards, and granting limited "rights" to those subjected to the tests, proponents of the polygraph hoped to legitimize the use of "lie detectors" in the workplace.

In the 97th Congress, polygraph proponents went a step further by pushing a bill not only limiting the questions asked and prescribing the procedures, but also prescribing a minimal requirement that cardiovascular, respiratory, and galvanic skin responses be recorded, and prohibiting "surreptitious" examinations. These additional requirements were designed to outlaw the fast-growing use of "voice analyzers," which compete with the polygraph. The voice-stress analyzer (VSA) and its progeny purport to detect truth or deception from "micro-tremors" in the voice. By requiring the three physiological measurements and forbidding surreptitious testing, the polygraphers were in effect trying to ban the competition.

In 1977 and 1978, the Senate Judiciary Committee held four days of hearings on Senator Bayh's "Polygraph Control and Civil Liberties Protection Act" (S. 1845). The Committee printed a 653

page report (GPO stock #052-070-04772-1) on the hearings. The statements of the witnesses and the content of the exhibits give a clear indication of the parameters of the debate, and the casts supporting and opposing the polygraph. The practitioners and frequent procurers of such services defended the accuracy of the devices and justified their use as essential to curb employee theft. The opponents condemned the devices as intrusive, intimidating, ineffective and inaccurate, and violative of citizens' civil liberties.

In the 99th Congress, legislation to prevent the denial of employment opportunities caused by the use of "lie detector" tests in private sector workplaces was introduced in both the Senate and the House of Representatives. The Senate bill was introduced by you, Mr. Chairman, and Senator Orrin G. Hatch, who was then Chairman of the Labor and Human Resources Committee. The House bill was introduced by Representative Pat Williams of Montana.

Representative Williams' legislation passed the House of Representatives on March 12, 1986, on a strong, bipartisan vote of 236-173. It was the first time a polygraph bill ever succeeded in either Chamber of the Congress. Unfortunately, the 99th Congress ended before the Senate bill reached the Senate floor.

Representative Williams has reintroduced the Polygraph Protection Act (H.R. 1212) this year, and the bill has again received the bipartisan support necessary to move expeditiously through the legislative process. H.R. 1212 is cosponsored by more than 175 Members of Congress.

We strongly support legislation to end the abuse of so-called "lie detectors" in employment. The use of "lie detectors" is an insiduous employment practice which wrongfully denies job opportunities to hundreds of thousands of workers every year. Businesses that use the devices do not really need to do so. Twenty-one states already ban or restrict the use of polygraphs in employment, and yet employers are still able to run profitable businesses and hire honest and capable employees in those states.

State Legislation

Massachusetts was the first state in the union to ban compulsory polygraphing in the workplace by providing in 1959 that: "No employer shall require or subject an employee to any lie detector test as a condition of employment or continued employment" (Annotated Laws of Massachusetts, Chap. 149, Sec. 19B). During the following ten years other states followed Massachusetts' lead and enacted varying forms of of legislation designed to protect workers and job applicants from the polygraph and other forms of so-called "lie detectors": California (1963); Oregon (1963); Alaska (1964); Rhode Island (1964); Hawaii (1965);

Washington (1965); Delaware (1966); Maryland (1966); New Jersey (1966); Connecticut (1967); and Pennsylvania (1969).

Today, the use of "lie detectors" in the workplace is banned or restricted by statute in twenty-two states plus the District of Columbia. State statutes generally seek to protect employees and applicants for employment from being required to take lie detector examinations. But half the states which forbid an employer to require a lie detector examination allow an employer to solicit or request the same examination:

California	Oregon
Hawaii	Pennsylvania
Idaho	Rhode Island
Iowa	Vermont
Maryland	Washington
Montana	

Rhode Island, for example, forbids an employer to "require" a lie detector examination, but says nothing that affects employers who would merely "request" such a test -- allowing an employer the right to pressure employees and job applicants with the implicit threat of the loss of employment for those who refuse to avail themselves of the opportunity to take the test. For example, an employer can tell his employees that they are suspected of stealing but they will not be fired if they can prove their innocence by some means, such as by taking a polygraph examination.

Other states have forbidden employers to either require or request employees and prospective employees to take lie detector examinations:

Alaska	Minnesota
Connecticut	New Jersey
Delaware	New York
Maine	West Virginia
Massachusetts	Wisconsin
Michigan	

However, even these states allow employees and job applicants to "voluntarily" take lie detector examinations. Undoubtedly the drafters of these laws felt it would only be fair to allow employees and job applicants to prove their innocence by submitting to lie detector examinations. Unfortunately for these "volunteers," the polygraph can be as likely to condemn an innocent and truthful person as it is to clear him (see Part IV of this testimony for a discussion of studies which show the false positive rate of the polygraph may be as high as fifty percent).

These state statutes speak eloquently of the desire of state legislators to protect employees and those who seek employment from the indignities and dangers of so-called "lie detectors." But these state prohibitions and restrictions are inherently

inadequate. Many employers skirt state law by simply hiring in a neighboring state with no restrictions, and then "transferring" the employees into the state which has lie detector restrictions. As long as neighboring states allow job seekers to be polygraphed, applicants for employment can simply be required to cross a nearby state border to submit to what their own state forbids.

Chain stores which operate in more than one state find it particularly easy to evade these state laws. This simple circumvention of state laws can only be stopped with Federal legislation. Otherwise, employers who are intent on subjecting their employees and prospective employees to polygraphs and other "lie detectors" will continue to find it is a simple and inexpensive proposition to evade the law merely by crossing state borders.

Thirty-one states have imposed various licensing requirements for polygraphers, either as the sole legislative "protection" against abuse, or in conjunction with other restrictive statutes:

Alabama	Montana
Arizona	Nebraska
Arkansas	Nevada
California	New Mexico
Florida	North Carolina
Georgia	North Dakota
Illinois	Oklahoma
Indiana	Oregon
Iowa	South Carolina
Kentucky	South Dakota
Louisiana	Tennessee
Maine	Texas
Massachusetts	Utah
Michigan	Vermont
Mississippi	Virginia
	West Virginia

However, granting formal legal recognition in the form of state licenses to individuals who ply their trade in a field where validity is so seriously in doubt raises serious concerns about the role of governments in legitimizing a very questionable employment practice.

Licensing laws are counterproductive if the goal of legislators is to protect citizens from abuse at the hands of "lie detectors." Licensing requirements cannot ensure the validity of the examinations. The dangers of "lie detectors" result from much more than the qualifications of the individuals who administer the tests. The danger, and the irony, of polygraph licensing statutes is that they legitimize the machines, their operators and the entire pseudo-scientific process of "lie detecting." The result of this erroneous and misguided legitimation is an increased use of these "lie detectors." A survey reported in Personnel Journal in February, 1978, makes the point succinctly:

> Among all firms surveyed there is a substantially greater proportion of firms using the polygraph in states which legally prescribe licensing and training requirements for polygraph examiners than there is in states which do not regulate the practice in any way. Furthermore, there is a greater tendency for firms in regulated states to require (as oppose to request) the tests as a condition of employment or continued employment than exists in states where such regulation has not been effected.

Thus licensing statutes thwart the best intentions of their supporters. They begin as efforts to protect people and yet result in even greater abuse. The legislative histories in several states show legislators first tried to eliminate the abuses in employment by requiring the licensing of operators. But problems persisted and legislators passed even more restrictive statutes. Statistics indicate the abuse of polygraphs in employment has worsened, not improved, despite well-intentioned statutes in several states.

IV. VALIDITY

Polygraph "validity" is the extent to which the polygraph can accurately detect truth or deception. In other words, "validity" is the measure of whether the polygraph can do what its proponents claim it can do.

There are basically two types of validity studies: "Field" studies and "laboratory" studies. Field studies of polygraph validity are studies of actual cases in which polygraph examinations have been administered (usually to criminal suspects), and the researcher has no experimental control over the circumstances in which the crime or other event happens.

In most field studies of polygraph validity the polygraph examiner's decisions are compared to a subsequent determination of guilt or innocence (such as a judicial decision or a confession), in order to determine whether the polygraph examiner's decision was correct. This is probably the greatest weakness of field studies: the subsequent decisions of guilt or innocence may be wrong because courts may release guilty individuals, convict innocent people, dismiss cases for lack of evidence, and accept guilty pleas that result from plea bargaining. (O.T.A. Study, p. 39).

Laboratory studies of polygraph validity, on the other hand, use field methods of polygraphy, but in simulated and controlled

situations in which the researcher sets up a mock "crime" and assigns "guilt" or "innocence" with the collaboration of the polygraph examinees. (O.T.A. Study, p. 61). The weakness of such laboratory studies is that the mock "crimes" do not present the "guilty" subject with any serious consequences for being "caught" by the polygraph, and thus the mock "criminals" may not display the same emotional reactions found in real criminals or liars. (Taylor, p. 241).

Considering the extent to which polygraphs are used by private employers, government, and law enforcement agencies, surprisingly little serious research has been done on polygraph validity, particularly as polygraphs are used by business. The results of polygraph validity studies vary widely, depending on the methodology used, the motives of the researchers, and many other factors. It would be impossible to assign any single number as the single and correct validity level of the polygraph. The best way to understand the validity of the polygraph is to review and analyze several studies as a whole.

Laboratory Studies

1. In 1975 two researchers from the University of Utah named Barland and Raskin conducted a study of polygraph validity involving seventy-two student volunteers. A mock "crime" was set up involving the theft of a valuable object or a small sum of money. Half the students were assigned a "guilty" condition and the other half were assigned an "innocent" condition. Each student was then administered a polygraph examination.

The result was that 35% of the polygraph examinations were inconclusive and 12% were incorrect. Of the incorrect examinations, two-thirds were false positives (that is, two-thirds were "innocent" subjects classified as guilty by the polygraph) and one-third were false negatives (that is, one-third were "guilty" subjects classified as innocent by the polygraph). Only about half (53%) of the test subjects were correctly identified by the polygrapher. (O.T.A. Study, pp. 655-66).

2. In 1978 an extensive validity study by Podlesny and Raskin indicated that behavioral observations alone were more effective than the polygraph in correctly identifying "guilty" subjects. This study required polygraphers to make decisions of guilt or innocence based on visual observation of the test subjects, without using the polygraph. Visual observations alone produced these results: a) among the "guilty" subjects, 86% were correctly classified; b) among the "innocent" subjects 48% were correctly classified.

The polygraph, on the other hand, produced these overall results: 10% inconclusive; 10% incorrect (four-fifths false negatives and one-fifth false positives); and 80% correct. Thus,

in correctly identifying "guilty" subjects, the behavioral observations of the polygraphers were more accurate than the polygraph overall. (Id., pp. 66-67).

3. In 1981, Barland conducted one of the few validity studies ever done on the use of polygraphs in pre-employment screening. His subjects were military personnel who worked in the intelligence field. He told about half of them to lie on one of the relevant questions during the polygraph examination, and those examinees were each offered twenty dollars if they could appear truthful in the examination.

Depending on which of three methods of polygraph chart interpretation was used, these were the results:

For Truthful Subjects:
1) 15-23% incorrect
2) 04-19% inconclusive
3) 62-77% correct

For Deceptive Subjects:
1) 13-23% incorrect
2) 07-27% inconclusive
3) 50-80% correct

(Id., pp. 76-77).

In its 1983 report entitled "Scientific Validity of Polygraph Testing," the Congressional Office of Technology Assessment (O.T.A.) stated that: "The results of the Barland study raise serious questions about the usefulness of directed lie control questions in screening procedures as well as, in general, the validity of polygraph testing for pre-employment and counterintelligence purposes, especially if used alone." (Id., p. 77).

4. One of the most definitive laboratory studies of the reliability of "truth verification devices" was commissioned by the U.S. Army Land Warfare Laboratory. This report, conducted by Dr. Joseph F. Kubis of Fordham University, was designated as classified material by the Army. But under pressure from former Congressman Froelich of Wisconsin, it was declassified and released to the public in 1974.

The results of the study are illuminating. The original group of subjects was divided in triads of three basic roles (Thief, Lookout, Innocent Suspect) in a simulated theft situation. The experienced polygraphers made incorrect evaluations 24% of the time. When other examiners rated the polygraph charts without having seen the subjects being tested, accuracy dropped to between 50 and 60%.

On the other hand, it is interesting to note how accurate the polygrapher' judgments were when made on the basis of simply

observing subjects during questioning, without using the polygraph. When the original polygraph examiners were asked immediately after the test for an opinion, their personal judgments were right 65% of the time. This figure certainly warrants comparison with the 76% rating of fully "scientific" polygraph test results achieved by the experienced polygraphers using the polygraph; it suggests that the personnel manager using traditional interviews instead of the polygraph would hardly be at a disadvantage.

Field Studies

The first three field studies of polygraph validity examined here (Kleinmuntz and Szucko, 1982; Horvath, 1977; Barland and Raskin, 1976) share several characteristics. All three meet sound standards of scientific credibility. All three used criminal suspects. All three used reasonable criterion data to verify the polygraph results by using either subsequent confessions or the decisions of a panel of lawyers and judges.

In all three of these studies the polygraph charts of the criminal suspects were independently re-scored by polygraphers who had not administered the original polygraph examinations. (Lykken, "Detecting Deception in 1984," p.13). Finally, the results of all three studies show it is truly innocent people who suffer the most at the hands of the polygraph.

1. In 1982 Kleinmuntz and Szucko obtained the charts of one-hundred polygraph examinations which had been conducted by the well known Reid Polygraph Agency in Chicago. Fifty of these charts had been verified as deceptive by the subsequent confessions of the examinees, and the remaining fifty had been verified as truthful by the subsequent confessions of other people. Polygraphers from the Reid agency then independently re-scored all one-hundred charts. The polygraphers incorrectly classified fully 39% of the verified innocent examinees as guilty. (Id., p. 16).

2. In 1977 Horvath published a polygraph validity study using fifty-six polygraph examination charts from the files of a police agency, all of which had been verified by subsequent confessions. Horvath had previously been the chief polygrapher for the Reid polygraph agency.

These polygraph charts were then re-scored independently by ten polygraphers. Of the innocent examinees only half (51%) were correctly scored as truthful. The overall accuracy obtained by the ten polygraphers was only 64%. (Id., p. 14). The innocent people would evidently have fared just as well had their "examiners" simply flipped a coin to determine their guilt or innocence, instead of using the polygraph.

3. In 1976 Barland and Raskin conducted a polygraph validity study as part of Barland's doctoral research. Barland administered polygraph examinations to ninety-two criminal suspects and Raskin then independently scored those charts. The guilt or innocence of the suspects was verified by an expert panel of one judge, two defense lawyers and two prosecutors who examined each suspect's dossier.

Based on the decisions of the expert panel, Raskin incorrectly classified 55% of the innocent suspects as deceptive. Raskin's average, overall accuracy was only 72%. Interestingly, Raskin had to score over 20% of the polygraph charts as inconclusive, and even then the polygraph was correct less than half of the time for the innocent suspects. (Id., pp. 13-14). Given Raskin's results, it is clear those innocent suspects would have fared better with a simple flip of a coin.

4. In 1971 Horvath and Reid conducted a polygraph validity study which is widely quoted by supporters of the polygraph (Reid was the founder of the Reid College of the Detection of Deception in Chicago). Horvath and Reid selected the charts of seventy-five verified polygraph examinations from the files of Reid's polygraph agency. Forty of those charts were then re-scored independently by ten polygraphers. Thirty-five of the seventy-five polygraph charts were not re-scored, because they were either "uninterpretable by even the most skilled examiner," or "dramatically indicative of truth or deception." (Id., p. 11).

Among the ten polygraphers who re-scored the forty charts, seven were experienced examiners. Those seven polygraphers were able to re-score 91% of the charts correctly. However, one should note the figure of 91% correct was based on the re-scoring of a selected group of forty out of an original seventy-five charts. It would be a mistake to accept the results of this study as representative of the usual results obtained in the normal conduct of Reid's polygraph agency. (Id.).

As noted above, Kleinmuntz and Szucko (1982) also used polygraph charts from the Reid polygraph agency. Two reasons Kleinmuntz and Szucko's results (average accuracy of 73%) differed from Horvath and Reid's results (average accuracy 91%) are most likely because Kleinmuntz and Szucko's charts were selected by an independent investigator, and <u>all</u> of their charts were re-scored, instead of only a select number. (Id., pp. 16-17).

5. In 1981 Edwards, an employee of the Virginia State Crime Laboratory, conducted a polygraph validity study which involved mailing a questionnaire to all licensed polygraph examiners in Virginia, asking: a) How many polygraph tests did you administer in 1980?; b) how many of these tests were later verified to your satisfaction?; and c) how many of the verified tests were correct?

Forty-one (mostly police polygraphers) of Virginia's one-hundred and forty-seven licensed polygraphers answered the questionnaire. They reported having administered 2,620 tests in 1980, averaging eighty-five tests for each active polygrapher. That figure does not include the kind of tests administered to job applicants since only thirteen percent of the private polygraphers answered the questionnaire.

The polygraphers claimed to have verified forty percent of their tests, and on these tests they claimed to have been correct over 97% of the time. (Id., pp. 12-13). The methodology and results of this study prompted the following response from Dr. David Lykken of Minnesota:

> It seems supererogatory to criticize this alleged study in detail. One wonders what would happen if one were to send a similar questionnaire to all licensed astrologers in the state of Virginia asking how many predictions they had made during 1980, how many had been "verified", and how many of these had proved correct. (Id., p. 13).

The Congressional Office of Technology Assessment (O.T.A.) reviewed ten field studies of polygraph validity and found the results of these studies varied widely. O.T.A. summarized its findings as follows:

- false negatives (i.e., classifying a deceptive person as truthful) varied from 29.4% to 0%;
- false positives (i.e., classifying a truthful individual as deceptive) varied from 75% to 0%;
- inconclusive results varied from 0% to 25%;
- correct guilty detections varied from 70.6% to 98.6%;
- correct innocent detections varied from 12.5% to 94.1%.

(O.T.A. Study, p. 52).

In its November, 1983 publication, "Scientific Validity of Polygraph Testing," O.T.A. summarized its review of over thirty polygraph validity studies in charts which appear on pages 53, 63, and 64 of the O.T.A. study.

The significance of a 90%, 80%, or 70% polygraph validity rate cannot be fully understood unless one comprehends what that figure means to the individuals, particularly the inhocent individuals, who are subjected to the polygraph examinations. For example, O.T.A. determined the mathematical chance of false positives (incorrectly classifying an innocent person as deceptive) is greatest when polygraphs are used to screen people.

The reason for this, according to O.T.A., is that in most screening situations only a very small proportion of the screened individuals are guilty.

Thus, according to O.T.A., if typically one out of a thousand people is guilty, and we assume the polygraph is 99% accurate (an extremely high accuracy level which even the staunchest polygraph supporter could not defend), then the law of probability would result in one guilty person being correctly identified as guilty, but ten innocent people would be wrongly classified as guilty. (Id., pp. 5-6). If an accuracy rating of less than 99% is assumed (a safe assumption given the studies reviewed above), the incorrect classification of innocent people as guilty increases substantially.

Another example illustrates the problem:

Assume that five percent of the people being screened are actually guilty. Also assume a very high validity rate of ninety percent. In this situation, the polygraph would only have a thirty-three percent predictive value, since for every person correctly identified as deceptive, two innocent people would be wrongly classified as guilty. It is a matter of simple mathematics that in order to catch ninety percent of the guilty individuals, sixty-eight percent of the people who fail the polygraph test will have been telling the truth.

To lower the false positive rate (the percentage of innocents classified as guilty), one would have to allow more guilty individuals to escape undetected. But as more guilty people are cleared of suspicion so as to protect the innocent, the reasons for using the polygraph in the first place disappear. (See O.T.A. Study, pp. 98-99).

Given the results of studies demonstrating validity rates much lower than 90 percent (Horvath, 1977 = 64%; Kleinmuntz and Szucko, 1982 = 73%), the negative impact of polygraph screening on innocent and truthful subjects is in reality probably far greater than in the two hypotheticals above, and the consequences are all the more disturbing.

As discussed above in Part II, private employers use polygraphs extensively in screening situations, both to screen applicants for employment and to screen large numbers of employees during investigations of suspected employee theft. Yet it is in precisely these types of situations that the validity of the polygraph is lowest, and most damaging to innocent people.

Even the F.B.I. does not believe large-scale screening is an appropriate use of the polygraph. The F.B.I. has regulations which prohibit the "use of the polygraph for dragnet-type screening of large numbers of suspects or as a substitute for logical investigation by conventional means." (F.B.I. Polygraph Regulation 13-22.2(2), 1980, as cited in O.T.A. Study, p. 99).

The risks which the inaccuracy of the polygraph pose to innocent and truthful workers are exacerbated by the bias of the polygraphers who work for private employers. Professor Lawrence Taylor of the Gonzaga University School of Law describes the bias problem:

> Polygraphists are motivated to serve their paying clients. Since clients have an interest in identifying guilty suspects, the polygraphers must expect to uncover cases of deception. Governmental agencies and corporations that want to ferret out security risks or dishonest persons in their organizations expect the polygraphist to identify such people. These firms often also retain polygraphists for employment screening and "periodic honesty checks," a lucrative source of income for many polygraphists.
>
> The source of the problem is that such agencies may be more troubled by false negative errors--that is, errors that occur because a polygraphist classifies a guilty or deceptive employee as innocent or truthful--than by false positive errors. From the vantage point of a bank or security agency, it is far better to err on the side of caution and perhaps even fire (or not hire) a trustworthy person than to run the risk of retaining a potential thief. . . .
>
> This motivation is unmistakably communicated to polygraph firms in the form of client loyalty and referrals. But it seriously comprises the polygraphist's objectivity and biases the findings against the nonpaying client, who is likely to be an individual with limited resources and is unlikely to have the power of a repeat player. (Taylor, pp. 243-44).

Thus, because of the inaccuracy of the polygraph itself and the potential bias of polygraphers, innocent and truthful people are more likely to be misjudged than are the truly guilty. In 1979 Waid and his associates conducted a study which showed that highly socialized people (that is, people who have highly developed moral standards and consciences) tend to fail polygraph examinations even though they tell the truth. Conversely, poorly socialized people are more likely to "pass" a polygraph examination whether they tell the truth or not. (Id., p. 17). According to Dr. Lykken:

> The irony is that by basing more and more important social decisions on the results of polygraph tests we may be producing an effect opposite to that intended, firing the most honorable police officers, refusing to hire the potentially most reliable employees, putting highly socialized citizens into unemployment lines or

> even in prison, while staffing our security agencies with the under-socialized . . . or with those clever enough to know how to beat the polygraph. (Id., p. 18).

Supporters of the polygraph argue that the polygraph works because lying causes conflict in a person's mind, which causes fear and anxiety, which in turn causes physiological changes detected by the polygraph. They are at least partly correct in that the polygraph can detect physiological changes. But there is no such thing as a "lying response." There is no physiological response specifically and exclusively associated with lying.

When a polygraph detects a change in a person's physiology, that change can mean any of three different things: 1) The person told the truth but one of many human emotions (grief, anger, embarrassment, fear, etc.) caused the physiological change; 2) a neurotic pre-condition caused the physiological change; or 3) the person lied. (Privacy, Polygraphs, and Employment, p.7).

Many different factors and conditions can affect the outcome of a polygraph examination and cause an honest person to be labeled a liar, or cause a dishonest person to escape detection. Physiological abnormalities such as blood pressure problems, heart conditions, colds and headaches can affect the outcome of the examination. Fatigue, drugs, alcohol, and body movements can also affect the polygraph (Id.).

Yet, despite all the evidence of the serious limitations of polygraphs and the examiners who use them, over two million polygraph examinations are administered in the United States every year. Mathematical calculation of error rates and misclassification, applied on a national scale, translate into lost employment and lost employment opportunities numbering in the hundreds of thousands annually. Such high social and economic costs indicate the need for a national policy to end the abuse of "lie detectors" in employment.

V. VOICE ANALYZERS

Though the polygraph may be the best known "lie detector," two other devices are becoming increasingly popular with employers seeking an inexpensive and uncomplicated way to test job applicants and employees. These devices are the Psychological Stress Evaluator (P.S.E.) and the Voice Stress Analyzer (V.S.A.). Both of these devices are used to detect lies by analyzing the human voice, but each analyzes different features of speech and they differ in design. (The Use of Polygraphs and Similar Devices by Federal Agencies, p. 6).

The P.S.E.:

The Psychological Stress Evaluator (P.S.E.) was invented by two former army intelligence officers, Charles McQuiston and Allan Bell, who have marketed their device since 1970 through Dektor Counterintelligence and Security, Inc., in Springfield, Virginia. Like the polygraph, the P.S.E. is supposed to be able to detect a lie by measuring involuntary physiological changes which are associated with stress.

The P.S.E. measures the audible and inaudible frequency modulations (or "microtremors") of the human voice, and displays the results on a graph. To make the device work, a tape-recording is made of a person's "yes" and "no" answers to a series of questions, and then a tape is played on the P.S.E. at one-quarter speed. If the P.S.E. detects microtremors in a person's voice, the machine's stylus will move erratically on the graph paper, supposedly showing that the person told the truth during questioning.

If the P.S.E. does not detect any microtremors, then the stylus creates a tight pattern of vertical lines, supposedly showing that the person lied during questioning. The theory behind the P.S.E. is that lying causes stress, and stress causes an absence of microtremors in the human voice, which is detected by the P.S.E. (Id., pp. 5-6; and Jenkins, p. 55).

The V.S.A.:

The Voice Stress Analyzer (V.S.A.) was developed in 1970, at roughly the same time as the P.S.E.. The V.S.A. detects rapid variations in the vibrato or tremolo amplitude of speech, and electronically assigns numerical values to those variations. The V.S.A. then instantaneously displays a number supposedly indicating whether a person lied or told the truth. The inventors of the V.S.A. claim that the changes in vibrato voice amplitude vary with changes in levels of emotional stress associated with lying (The Use of Polygraphs and Similar Devices by Federal Agencies, p. 6).

Though the P.S.E. and the V.S.A. are designed differently and measure different qualities of speech, they are both "lie detectors" which are supposedly capable of detecting lies by analyzing the human voice. Voice analyzers have become increasingly popular as alternatives to the standard polygraph because they are compact, easy to operate, and can be surreptitiously administered without the subject's knowledge.

Voice analyzers have few moving parts and they are wireless -- there are no electrodes, no rubber hoses for the chest and

abdomen, and no blood pressure cuffs to attach to an examinee. Voice analyzers are thus very unobtrusive. During an interview or interrogation only a small microphone is visible, and even that can easily be hidden. Moreover, voice analyzers do not even have to be used during an interview. An interview can simply be tape-recorded (even over the telephone) and "analyzed" later by the voice analyzer (Id., p. 6; and Jenkins, p. 5).

The manufacturers of voice analyzers are well aware that their devices can be used unobtrusively and even covertly. A promotional pamphlet for a voice analyzer manufactured by the Hagoth Corporation of Issaquah, Washington, states: "In a covert interrogation . . . by following a few simple rules you can unerringly spot a liar." ("Business Buys the Lie Detector," p. 104). Charles Glazerman of Dektor believes that "The beauty of the PSE as opposed to the polygraph is that there is no artificial stress being induced." (Id., p. 104). Apparently Mr. Glazerman believes that his "lie detector" works better if a person is unaware that he or she is being examined.

Even if voice analyzer manufacturers do not recommend using their products covertly, the very design of voice analyzers makes it easy to use them covertly. For example, C.C.S. Communication Control, Inc., of New York City, sells a pocket-size voice analyzer. In an advertisement for its miniature "lie detector," CCS states: "Voice Stress Analyzer. This is the same high quality system used by professionals to detect truth from deception . . . but it is ultra miniaturized to carry in a pocket. To find if your employees are stealing . . . if your business associates are cheating . . . if your friends are really your friends . . . carry the Mini VSA wherever you go." (Advertisement in the New York Times, September 11, 1983).

Accuracy:

J.W. Heisse, Jr., the president of an association of voice stress analysts, claims that the P.S.E. is 96% accurate. Mr. Heisse bases his claim on a study of fifty-two verified P.S.E. charts selected (twenty-seven of them by Mr. Heisse) for blind re-scoring by twelve P.S.E. examiners. Five re-scorings were reported for each chart. (Lykken, "Detecting Deception in 1984," pp. 9-10) This study prompted the following observations by Dr. David Lykken of the University of Minnesota:

> The faults of this study are legion. First, the "verification" of the tested person's actual guilt or innocence was essentially left to the original examiner's opinion. Secondly, if all of the re-scorers actually re-scored all of the charts, as should have been done, then more than half of these re-scorings are inexplicably left out of account. Third, and fatal to the entire enterprise, the original charts to be re-

> scored in this study of P.S.E. "validity" were selected first by the original examiners themselves and then apparently selected again by Heisse. If a professional P.S.E. examiner is invited to submit for formal re-scoring verified charts from his collection, can we really suppose that he will offer charts that he scored incorrectly in the first instance? (Id., p. 10).

Dr. Lykken adds that studies of P.S.E. accuracy by researchers who have no personal or professional stake in the results of their studies, and who use randomly selected P.S.E. charts, "have consistently found that pairs of trained 'analysts' cannot agree in their scoring of a truly unselected run of charts at much above chance levels." (Id., pp. 10-11).

One of the most definitive studies of "truth verification" devices, commissioned by the U.S. Army Land Warfare Laboratory and conducted by Dr. Joseph F. Kubis of Fordham University, examined the validity of voice analysis and polygraphs (see Part III of this document for a discussion of the study's results on polygraph validity). Dr. Kubis first set up a simulated theft and divided the original group of subjects into triads of three basic roles: thief, lookout, and innocent suspect.

The subjects were then administered P.S.E. examinations. Since three subjects were involved in the mock theft, the statistical chances of correctly identifying a subject as "guilty" or "innocent," based purely on chance, were obviously one out of three, or 33%. When the P.S.E. was used to individually determine each subjects' status, the P.S.E. was correct only 32% of the time -- less than simple chance. When the three members of each triad were examined together, the P.S.E. was correct only 53% of the time. However, when the examiners determined a subject's "guilt" or "innocence" by simply observing the subject's behavior, the examiners were correct 65% of the time!

The results of scientific studies of voice analyzer accuracy should alarm and dismay any person subjected to such a test at work or as part of a hiring procedure. For in addition to the limitations of the machines, one must also consider the limitations of the people who use them. For example, Dektor (manufacturers of P.S.E.'s) gives the purchasers of its machines a five day course on how to use the device. (Jenkins, p. 55).

If a voice analyzer can be less accurate than pure chance even under laboratory conditions, one can only speculate as to the validity of such devices in the hands of employers anxious to "catch" employees or job applicants by using these "lie detectors," covertly or otherwise. Why do employers use these devices? Perhaps Richard H. Bennett Jr., President of Hagoth Corporation (producers of voice analyzers) explained the true appeal of these "lie detectors" when he said: "This product

appeals to the desire to buy a terrific toy." ("Business Buys The Lie Detector," p. 104).

Again, thank you Mr. Chairman, for holding these important hearings on one of today's fastest growing forms of employee intimidation. We urge the Committee to take strong and effective action to end the abuse of so-called "lie detectors" in the workplace, so workers may regain the dignity and self-respect they deserve.

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Before the

UNITED STATES SENATE
COMMITTEE ON LABOR AND HUMAN RESOURCES

JUNE 26, 1987
WASHINGTON, DC

Statement of the

AMERICAN TRUCKING ASSOCIATIONS

On

POLYGRAPHS IN THE WORKPLACE

Thomas J. Donohue
President & Chief Executive Officer

ATA POLYGRAPH STATEMENT

I. INTRODUCTION

Mr. Chairman and members of the Committee on Labor and Human Resources, as President and Chief Executive Officer of the American Trucking Associations, I am submitting this statement on behalf of the American Trucking Associations, to present the views of the trucking industry on the important issues involved with the use of the polygraph.

Through its 51 affiliated trucking associations located in every state and the District of Columbia, 10 affiliated conferences, and several thousand individual motor carriers, ATA represents every type and class of motor carrier in the country, for-hire and private; regulated and exempt. Thus, ATA is uniquely qualified to articulate the views of the industry with respect to the importance of the polygraph.

The American trucking industry provides an essential transportation service to the largest economy in the world. Employing more people, handling more freight and traveling more miles than any other transportation mode, it is the largest form of transportation in the country.

Each year, over five million trucks, operated by thousands of truck drivers, log more than 126 billion miles on our nation's highways, interacting with the motorist on a seven-day per week, 24-hour basis, every day of the year.

It is vital to the nation's welfare, and the trucking industry's responsibility to the American public, that we hire the best drivers possible. Our drivers must have good driving records, no patterns of drug and alcohol abuse, or other problems that could compromise the safety of our nation's roads and jeopardize the lives of millions of our citizens.

The trucking industry receives 77% of the revenues collected for all freight carried in the United States. The cargo we carry includes shipments of hazardous materials, controlled drugs, high-value items such as computers, as well as general commodities of all types. We are also the largest carrier of highly sensitive materiel involving national security for the Department of Defense. We haul thousands of shipments of arms, ammunition, explosives, and other defense--related items. The security of this vast amount of freight is dependent on honest, reliable, and trustworthy drivers.

Finally, our drivers have direct access to the homes, as well as businesses, of America. Each year, thousands of Americans move their households through the services of a major segment of the trucking industry - the nation's movers. Naturally, we are concerned that the individuals, who by their occupations, freely enter our country's homes and are entrusted with valuable personal possessions, do not have past conduct that should legitimately be of concern.

In short, the trucking industry and its employees play a unique role in the safety of Americans -- on the road and in their homes, in national security, in the delivery of important cargo such as hazardous materials and drugs, and in transporting most of the nation's freight safely and secure from theft.

Accordingly, the trucking industry is vitally interested in any legislation that affects its hiring procedures and personnel policies. The polygraph plays a key role in helping to assure the hiring of high-quality professionals. Thus, we appreciate the opportunity to state our opposition to any legislation that would prohibit the use of the polygraph or similar devices by all private sector employers.

II. THE NATURE OF TRUCK OPERATIONS

A brief description of the trucking industry and of typical motor carrier operations may assist the Committee in understanding the importance of the polygraph as both a pre-employment tool and in theft investigations. The trucking industry includes both for-hire and private carriers. The for-hire sector includes common carriers serving the shipping public at large and contract carriers who have arrangements with specific shippers. Private carriers comprise that segment of the trucking industry made up of retailers, manufacturers and others which transport their own goods or supplies.

Basic for-hire motor carrier operations are less-than-truckload, truckload, and household goods movements. A less-than-truckload or LTL operation involves the gathering, transporting, and distributing of shipments, often made up of dozens of individual packages. Briefly, the carrier sends out a local driver to pick up shipments from several shippers. The shipments are then taken to a carrier's terminal where dock workers sort them by destination and consolidate them with other shipments going to the same point. The shipments are then transported to a destination terminal where they are re-sorted and loaded into local delivery trucks for delivery along with shipments to other consignees along a specific route.

In comparison, a typical truckload operation involves the dispatching of an over-the-road vehicle to a single shipper's facility. There the freight is loaded onto the truck and transported either to a single destination or to several drop-off points. In truckload operations, the driver usually goes directly from the shipper's facility to the delivery point, checking in with the carrier by telephone at points along the way.

You are all probably more familiar with the third type of operation -- that of a household goods mover. Household goods carrier employees have the most direct contact with the private individual. They enter your homes and they handle your most valuable and dearest possessions. They are usually

responsible for packing, loading, transporting, unloading, and often unpacking your personal goods. Most of this activity takes place in the confines of your own home, during a period when you may or may not be present.

All three types of motor carrier operations are supported by two groups of very important personnel: (1) crews of mechanics who are responsible for the safe maintenance of the millions of trucks operating on the highways; and (2) dispatchers who are responsible for the scheduling, routing, and overseeing of the operation of the vehicles.

In a majority of operations, a particular vehicle may carry a load consisting of commodities and goods as diverse as guns, toasters, and drugs. Similarly, an individual driver may transport a truckload of explosives or similar shipment for the Department of Defense on Monday and return with a load of tires for a commercial shipper on Tuesday. Consequently, the nature of the industry allows few companies to dedicate their equipment or personnel to the carriage of specific commodities or to a specific shipper. Further, a common carrier must, under law, transport all commodities tendered to it so it cannot, for example, accept toasters and not accept guns or drugs.

The key employees to motor carrier operations, of course, are the drivers. Unlike employees in many industries, truck drivers are essentially unsupervised in the course of their work on the road. Because of the nature of

trucking operations, as described above, all of a company's drivers must be qualified and trusted to carry the entire range of commodities available for transport. Under these conditions, the quality of the individual hired is especially important.

The importance of a quality driver is underscored by the fact that the industry interacts with 172,000,000 other motorists day-in and day-out, all year long. Further, truck drivers have direct access to almost every business, factory, retail outlet, warehouse, military establishment and at some time -- home in America.

III. THE TRUCKING INDUSTRY'S ESSENTIAL NEED FOR THE POLYGRAPH

The trucking industry has always made highway safety a priority issue. Since deregulation in 1980, the number of truck operators using the highways has increased. With a rising accident rate in recent years, the trucking industry has put even more emphasis on highway safety issues. We must keep all the current tools that help achieve safe roads, including the polygraph, and we are seeking to obtain whatever new ones we can.

Since 1940, the trucking industry has had comprehensive standards to help motor carriers evaluate abilities, character and personality traits of each job applicant. These standards consist of applications for employment, driving

record checks, past employment reference checks, and structured interviews. They establish a system of fact finding and analysis to determine that the job applicant who will be hired can do the job safely, honestly and effectively. The standards provide the means for weighing human accomplishments and human failings in relation to the requirements of the job. In 1971, the Federal government adopted similar standards that are applicable as regulatory requirements for motor carriers, to assure that employers check out a driver applicant's license record, traffic violations record, past employment history and accident record.

However, the industry standards and the Federal regulatory requirement are limited in their effectiveness. Prospective employees can hide poor driving records and accidents, drug and alcohol problems, and involvement in criminal activity, theft, gambling, and other relevant employment factors that are not detected through traditional employment screening. They can do this by falsifying or omitting information, or because they have not been caught in past thefts or drug/alcohol usage. Unreported accidents and undetected thefts and drug abuse will not show up in any record available to an employer.

Our carriers report that detailed reference checks are inadequate to identify these important issues. Out of concern over potential lawsuits, former employers are often reluctant to verify anything about a prospect except the

dates of his employment. The polygraph has proven to be a valuable tool in filling the void left by other pre-employment screening devices, by identifying negative traits and problems crucial to an employment decision where the public welfare is at stake.

A. Highway Safety Concerns

1. Drug and Alcohol Abuse Problems

It is beyond dispute that substance abuse is a national problem. Indeed, both Congress and the President have proposed measures for testing federal and private employees occupying positions where their actions could affect the public health, safety or other national concerns. Against this backdrop, it seems unwise to eliminate a tool having the potential to screen out persons who are currently substance abusers or who have a history of such abuse.

While we have no reason to believe that the trucking industry is more susceptible to this problem than other industries, because of the dangers that drivers under the influence of alcohol or drugs pose to the public, we believe it is imperative that the employees the industry hires are drug free and do not have histories of substance abuse. While current laboratory tests may identify recent use of alcohol and drugs, the polygraph can be used to help identify deep-rooted problems and long-term histories of abuse or dependencies.

Consider just a few examples of polygraph results on some prospects who had passed senior management interviews with one of our carriers. I would like to stress that these candidates voluntarily gave this information with no deception indicated. Under questioning, one applicant admitted using speed 5,000 times in his life along with occasional uses of marijuana, hashish, and cocaine. Another admitted using marijuana 5,000 times in his life as well as other drugs. Copies of the examiners' reports in these instances are attached.

Carriers are not interested in turning away a 30-year old applicant who used drugs as a teenager or who has an occasional drink. On the other hand, they are very concerned about individuals with chronic problems, such as those indicated in these examples, who could be maintaining or driving an 80,000 lb. truck, especially one of the hundreds of thousands of loads of hazardous materials or explosives.

B. Multiple License Problem

In 1986, Congress passed the Commercial Motor Vehicle Safety Act of 1986, which, among other things, mandates a single driver license system and creates a national clearing house for information on holders of commercial driver licenses. The ATA supported this legislation and welcomed its passage. This legislation will be implemented in phases, beginning in July 1987, and will not be fully effective until

October 1, 1993. Consequently, it has had no impact on the multiple license problem to date, and, in our view, is not likely to do so before the mid-1990's.

In the interim, truck drivers can continue to obtain more than one driver license unbeknownst to employers and regulators, thus enabling them to spread traffic violations among the licenses and hide a poor driving record. A 1981 study sponsored by the National Highway Traffic Safety Administration and conducted by the American Association of Motor Vehicle Administrators estimates that from 10 to 32% of the groups of truck drivers surveyed, an "unacceptably high level," had more than one license. Often, the multiple licensing problem is brought to light through truck accident investigations which show that a driver's poor traffic record was spread among so many licenses that it never became bad enough in any one state to trigger suspension or revocation. In other cases, drivers were found to have lost their privileges in one state, but were continuing to drive on a valid license obtained from another state.

In 1980, the National Transportation Safety Board published a report on the multiple licensing problems based on its investigation of 44 commercial drivers involved in serious accidents. The report showed that the drivers had a total of 63 licenses, 98 suspensions, 104 accidents, and 456 traffic convictions.

The Board concluded that, ". . . in spite of three levels of commercial driver screening -- the NDR (National Driver Register), state driver licensing policies, and screening by motor carriers pursuant to Federal regulations, problem commercial drivers continue to be licensed by the states and employed by motor carriers to operate heavy trucks and other commercial vehicles."

While the national driver license will eventually aid in addressing these abuses, as discussed above, it will be six years before the system is fully operational. In the interim, the polygraph can help in addressing this problem.

Moreover, the polygraph will continue to be useful in learning about undisclosed speeding and reckless driving, unreported accidents and similar matters. In this vein, it is important to bear in mind that truck drivers' abuses cannot be resolved through the national drivers license system until the driver is caught and his violations become a part of the record. Until that time, employers will always have to rely upon self-disclosure or disclosure through the polygraph.

B. National Security Concerns

Of equal importance is the fact that the motor carrier industry is the nation's largest transporter of goods for the Department of Defense. The industry handles more than 45,000 DOD shipments of arms, ammunition and explosives -- weighing

over 430,000 tons -- including shipments of missiles and similar armaments annually. Motor carrier drivers have direct access to major military bases and defense establishments. The trucking industry plays a highly important role, therefore, in the security of our nation.

When such goods are being transported on public highways, they are most susceptible to hijacking and theft. In view of the increasing threat of terrorism, the Defense Department has recently taken action to strengthen the security requirements for motor carrier shipments of sensitive arms, ammunition and explosives. These protective services include dual drivers, carrier-provided armed guards, escort vehicles, and constant surveillance, a procedure under which the vehicle must be under the constant observation of a motor carrier employee. Since the effectiveness of these security precautions depends, in the final analysis, upon the quality of the individuals who are required to implement them, it is essential that motor carrier employers be permitted to use every available means, including polygraphs, to help ensure that the individuals entrusted with sensitive DOD shipments are responsible, honest, drug-free, and loyal.

The experience of one of the largest motor carriers for the Department of Defense best illustrates the carriers' need for the tool in pre-employment screening. For economic reasons, the carrier discontinued pre-employment use of the polygraph for one year and found its accident rate escalat-

ing. The carrier reinstated the use of polygraph examinations in its pre-employment screening and found itself returning to its previous good safety record.

We believe that the excellent safety record of the motor carriers who haul freight for DOD has resulted, at least in part, from the ability of motor carrier employers to use the polygraph examination. The proposed ban on the use of polygraphs by motor carrier employers will have a detrimental effect on national security.

C. Household Goods Carriers

Another sector of the motor carrier industry, to which the availability of polygraphs is very important, is the household goods carrier. In the process of providing personalized moving services for individual consumers, moving company employees are given direct access to over a million private residences every year, spending from a few hours to several days with families packing, moving, and unpacking. Implicit in the effective performance of these individualized transportation services is a high degree of trust placed in household goods movers by their customers, for personal safety and the security of personal possessions.

A very positive aspect of the polygraph is its availability as an investigative tool to protect honest employees who may be accused or implicated in allegations of wrongdoing. While this aspect of polygraph testing applies to all

carrier employees, the need for protection is perhaps greatest in the moving industry where there is more direct personal contact with consumers. Movers report that polygraph testing has been extremely helpful in clearing their employees after allegations of theft or other wrongdoing are made by a consumer. One example given by a moving company involved a shipment of household goods owned by two customers, one of whom accused the mover's employees of stealing money from a purse. After the results of the polygraph tests supported the employees' denial of the allegations, the investigation was broadened. It was finally determined that the other customer, rather than the driver or packers, had taken the money. Without the use of polygraph testing, the employees in that situation may not have been able to clear their reputation.

The use of polygraphs in the moving industry is important to the protection of both the consumer who allows the carrier employees into his or her home and the employees who may stand accused of acts they did not commit.

D. Theft Prevention and Investigation

Another major problem facing the trucking industry is the prevention of theft. Theft of goods from motor carriers -- from the pilferage of small items from damaged cartons to the hijacking of entire truckloads -- amounts to over seven billion dollars annually. This is an enormous continuing

problem of concern to both carriers and shippers. Industry representatives believe this figure would be considerably higher without the use of polygraphs.

Shippers entrust their goods to motor carriers in much the same manner and with the same expectation as we entrust our monies to banks. The carrier in turn must rely on the honesty and reliability of its employees who, as discussed above, move goods on their own without physical supervision or control.

Theft is not only a major concern because of the number of dollars involved but also because of the important nature of much of the cargo the trucking industry carries. The trucking industry is involved in virtually every movement of drugs, including controlled drugs in the United States. The pilferage of shipments of guns and explosives, whether civilian or military, hazardous materials, and the like are not only economic issues but involve public safety and security as well.

The pre-employment screening of employees to determine whether they have histories of theft or other dishonest tendencies, as well as the availability of polygraphs for investigations of theft, is an important tool in theft prevention. The mere fact the polygraph is available is a significant deterrent to employee theft.

The polygraph is often the only way to uncover such tendencies. For example, carriers report that prior to or

during a polygraph examination many applicants admit thefts from former employers ranging from small to large items, such as furniture, that were undiscovered or unsolved.

The vulnerability of shipments to theft by employees where the polygraph is unavailable is underscored by an example cited by Congresswoman Roukema in the House debate on H.R. 1524, a bill considered in the last Congress. The Macheros, a Puerto Rican terrorist group, were able to plant a member of their group as a Wells Fargo armored car driver who robbed $8 million from the firm. Since the guard had no prior criminal record, the only way of detecting his motives would have been through the polygraph, which was unavailable due to state law restrictions.

The trucking industry moves valuable and sensitive freight of all types as we have indicated above. The polygraph is needed to prevent theft and identify wrongdoers should theft occur.

CONCLUSION

For all the reasons stated above, ATA opposes legislation that would prohibit continued use of the polygraph by the motor carrier industry. The polygraph is a tool which is essential to the fulfillment of the trucking industry's obligations to public welfare, national security, and other responsibilities. We note that a bill before the

House of Representatives, H.R. 1212, bans use of the polygraph by most private sector employers, but preserves the right of governments and certain parts of the defense and law enforcement industries to use it. Our need for its use is equally as great as these industries and government, whose millions of workers are exempt from the ban.

The trucking industry strongly supports the civil rights of its employees and prospective employees. Accordingly, we support legislation that would eliminate or minimize any abuses that may be occurring at the present time. For example, we would support a law which: regulates the qualifications of a polygraph operator; prohibits the asking of questions irrelevant to the employment sought and disallows employment actions based solely on the results of a polygraph examination.

ATA urges this Committee to reject any legislation that would ban polygraphs, or to enact legislation that regulates, but does not ban, polygraph use.

EXAMINATION DATE
:2/3/86

CLIENT - LOCATION
/ Transfer

RECOMMENDATIONS
High Security Risk

BIRTH DATE

EXAMINATION RESULTS
No Deception Indicated

EDUCATION
8th grade completed: , NC

MARITAL STATUS
Divorced

MILITARY SERVICE
None

SOCIAL SECURITY NUMBER

EMPLOYMENT HISTORY

1 year, 10 months: 3/84-1/86 — .1 Trucking, Driver, Wade, N.C.
Left when they went out of business.

2 years: 1982-1984 — Transport, Wilson, N.C. Driver. Left because

1 year, 5 months: 1/80-4/82: / Transfer, Rocky Mount, NC. Driver.
Terminated - truck stolen

"ALL IDENTIFYING FACTORS HAVE BEEN DELETED FROM THIS REPORT"

EXAMINATIONS — Transport, Express

NARCOTICS USE

Used marijuana 2 times in last 30 days; last time: last night (2/2/86)
Used marijuana 5 times in past 12 months.
Used marijuana 30 times in life.
Used hashish 1 time in life; last time 1983
Used cocaine 1 time in life; last used 11/85.
Used approx. 3,000 times in life; last used 1/86.
Sold speed (6 months ago last time). Total sold in life: $100.00.

THEFT FROM PREVIOUS EMPLOYERS

- oranges (d[illegible]
[illegible]).; - washing powder ([illegible])

GAMBLING/DRINKING HABITS

Occasionally gambles. Poker (10c stakes). Lottery ($1.00 stakes)
Spends approximately $15.00/year on alcoholic beverages. Has never used during working hours.

CONVICTION HISTORY

Non-support 1984
Careless and reckless driving 1982
Worthless check 1979

License Suspended 1984 - MD - failure to pay tickets: 3 weeks.
1983 - MD - failure to pay tickets 3 weeks.

GENERAL COMMENTS

Complete verbal report was given to Mr. on 2/3/86.

MEDICAL HISTORY

Last check-up 1983 summer.

INDEBTEDNESS

$4,000.00 Past due $75.00 furniture payment.

[illegible]

Investigation Agency

PREEMPLOYMENT
CONFIDENTIAL PROFILE

EXAMINATION DATE
10/29/85

RECOMMENDATIONS
High Security Risk

EXAMINATION RESULTS
No Deception Indicated

CLIENT LOCATION

BIRTH DATE
8/20/69

MARITAL STATUS
Married

EDUCATION
10 grades completed: Whitakers, North Caroline

MILITARY SERVICE
Article 15 - Disobeying Order
Article 15 - AWOL
Army, 10/66-10/69, Honorable Discharge: E-4

SOCIAL SECURITY NUMBER

EMPLOYMENT HISTORY
4/85-Present — Truck driver. Reason for leaving: Better opportunity.
6/84-4/85 — Truck driver. Reason for leaving: Pay check problems.
5/84-6/84 — Truck driver. Reason for leaving: Too little pay.
4/80-5/84 — Truck driver. Reason for leaving: Too little pay.

"ALL IDENTIFYING FACTORS HAVE BEEN DELETED FROM THIS REPORT"

TERMINATIONS

NARCOTICS USE
Used marijuana 2 times last 30 days - last time 3 weeks ago. Used marijuana 5,000 times in life. Used hashish 5 times in life - last time 1968. Used Valium 4 times in life - last time 1983. Marijuana used 10 times in past 12 months. Used amphetamines 15 times in life - last used 4/85.

Has never sold drugs.

THEFT FROM PREVIOUS EMPLOYERS
Shaving lotion, stick deodorant, ($20.00 worth); - rubber straps ($25.00 worth).

GAMBLING/DRINKING HABITS
Never gambles.

Spends approximately $2.00 week on alcoholic beverages. Used during working hours while at 2 weeks ago. Used during working hours 500 times.

CONVICTION HISTORY
1983, N.C., 66/55 zone, paid off.

GENERAL COMMENTS
Complete verbal report was given to Mr. 10/29/85.

MEDICAL HISTORY:
Last physical checkup 6/4/84. Has not been hospitalized past 10 years.

INDEBTEDNESS
$3,000.00. All current.

STATEMENT OF

JUDY GOLDBERG

LEGISLATIVE REPRESENTATIVE

AMERICAN CIVIL LIBERTIES UNION

before the

COMMITTEE ON LABOR AND HUMAN RESOURCES

U.S. SENATE

in support of

BANNING THE USE OF POLYGRAPHS IN THE WORKPLACE

June 19, 1987

Mr. Chairman and members of the committee:

Introduction

On behalf of the American Civil Liberties Union, I want to thank you for the opportunity to add our views to the permanent record of this hearing on the use of polygraph tests in the workplace. The American Civil Liberties Union is a non-partisan organization of over 275,000 members dedicated to the defense and enhancement of civil liberties.

I testify today in strong support of prohibiting the use of polygraph examinations as a condition of employment or continued employment in businesses engaged in interstate commerce. Such a law would protect the individual rights of millions of citizens and strike a blow for basic fairness in the workplace.

The American Civil Liberties Union opposes the use of lie detection devices as an invasion of privacy, an affront to human dignity, a violation of self incrimination prohibitions, and an unlawful search and seizure, whether or not at some future time such devices may be found to have scientific credibility.

There is a critical need for federal restrictions on private employers whose use of so-called "lie detectors" has tripled over the past decade to a level of some 2 million tests per year. The restrictions, along with provisions to enforce them and remedies for their violation, can protect the tens of thousands of persons who every year are unfairly denied or dismissed from employment in the private sector as a direct result of submitting or refusing to submit to what one expert has aptly called the "bloodless third-degree."

Scientific Unreliability

The polygraph test basically depends upon simple mechanical recordings of the fluctuations in an individual's rate of respiration, blood pressure and skin perspiration during a prescribed plan of interrogation. Polygraph advocates claim these recordings can be interpreted by "trained" examiners to provide conclusive evidence of the truth or falsity of the individual's "yes" or "no" answers to particular questions.

In fact, since there is no known physiological response that is uniquely identified with the act of deliberate deception, the polygraph technique is simply invalid. The so-called "lie detector" is really only a "stress detector" and a polygraph examiner has no scientific basis for distinguishing the stress that may indicate deception from any other stress, including fear, anger, humiliation or frustration regarding the polygraph test itself.

In 1983, the Office of Technology Assessment, the research arm of the U.S. Congress, released its comprehensive study Scientific Validity of Polygraph Testing. The study concluded

that: "available research evidence does not establish the scientific validity of the polygraph test for personnel security screening", and that "the further one gets away from the conditions of a criminal investigation, the weaker the evidence for polygraph validity". The report went on to express concerns about persons falsely labeled as deceptive by these tests.

The American Psychological Association recently has adopted a policy resolution recognizing that scientific evidence for polygraph test validity is "still unsatisfactory". This year the American Medical Association and the American Psychological Association have both testified in favor of restrictions on polygraph testing due to the tests' unreliability.

One of the foremost researchers on the validity of polygraph examinations, Dr. David Raskin, testified in April 1986 that "there is not a single scientific study which demonstrates any reasonable degree of accuracy for general employment (polygraph) screening tests". He went on to add that the degree of reliability of the polygraph as a detection device falls below 50% whenever the number of guilty people in a group to be tested is less than 20%, even when it is used to investigate specific incidents.

Even F. Lee Bailey, testifying in favor of polygraph use has stated that his support was confined to polygraph use in specific investigations, conducted by a skilled and highly trained examiner, and when the examination lasted a minimum of three hours. All his claims for accuracy were predicated on its use under those conditions. He also indicated that he did not believe the test was a reliable tool for employee screening. Brief employment screening tests, commonly used as a condition of employment, did not meet his definition of a polygraph test.

Testimony indicated that such tests brand an estimated 300,000 U.S. workers as deceptive each year, causing them to be fired, disciplined, or not hired.

The Issue of "Consent"

Some have argued that employer use of polygraph tests is not invasive because an employee is often required to sign a waiver stating that he or she consents to take the test voluntarily. This reasoning is self deceptive. In many cases employees are told, or are aware, that their only options are to take the test or to lose their job. Given this choice, is it surprising that many chose to take the test in spite of strong objections? Their consent in these cases is clearly coerced.

The Tests Have a Discriminatory Impact

This spring the Subcommittee on Employment Opportunities of the House Education and Labor committee heard testimony that there is mounting evidence that polygraph tests have a substantial discriminatory impact on black job applicants and

employees. In the Illinois case of Moon v. Cook County Police and Corrections Merit Board the judge found that the statistics:

> "demonstrate that a higher percentage of blacks failed the polygraph test than whites taking the same test. In fact, plaintiff's expert witness correctly determined ... that there was one chance in 1,000 that ... the proportion of blacks who failed the polygraph test would be as great as 72.5% (where 67.5% of those taking the test were black) if blacks had an equal chance of passing the test."

Obviously, a test which measures blood pressure, breathing and heartbeat can discriminate severely against persons with physical ailments or handicaps. In the case of Mark Smith v. Mechanics Lumber Company et al., an Arkansas man with multiple sclerosis was required to take several polygraph examinations. Not surprisingly, given the nature of his illness, he was told that he had failed the exam. The lawsuit alleges that the stress of the exams, and being told that he had failed the exams, brought on an aggravation of the MS, at one point making him partially paralyzed.

State Laws Vary Widely

The Employee Polygraph Protection Act would extend relief from the dubious "lie detector" to millions of prospective and current members of the private workforce who are not now covered or adequately protected under the patchwork quilt of diverse polygraph legislation that has been enacted over the years by forty-one states and the District of Columbia.

Only nine states currently have no laws governing any aspect of employee polygraph testing. Nineteen states either require licensing of polygraph examiners or regulate the conduct of polygraph examinations. Ten states[1/] prohibit most private employers from requiring a polygraph examination as a condition of employment or continued employment, but allow an employer to request such an exam. Finally, twelve states[2/] and the District of Columbia prohibit most private employers from requiring or requesting that a polygraph test be taken as a condition of employment, effectively banning its use in employment. (A listing of state laws is attached as Appendix 1.)

Some employers evade state laws which prohibit requiring polygraph testing for current or prospective employees by pressuring these individuals into "volunteering" for the examinations. Yet even where states have absolutely prohibited employment polygraph testing, employers have been known to evade the ban by hiring in a neighboring state which permits such

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1/ California, Hawaii, Idaho, Iowa, Montana, Maryland, Nebraska, Pennsylvania, Vermont, Wisconsin.

2/ Alaska, Connecticut, Delaware, Maine, Massachusetts, Michigan, Minnesota, New Jersey, Oregon, Rhode Island, Washington, West Virginia

testing, or requiring employees to cross state lines to take the test in an adjoining state where it is legal. (See Statement of Floyd S. Perlman, attached.)

States which license examiners or regulate the conduct of examinations vary widely in their statutes and regulations regarding the types of questions which may be asked during exams, the rights of employees who are tested, or the kind of training required for licensing.

State Regulation Unsuccessful

The regulatory approach has been remarkably ineffective in curbing polygraph abuse. ACLU affiliate offices in states which regulate but do not prohibit polygraphs reported receiving over 1,800 complaints relating to polygraph examinations during 1986. Six ACLU state offices reported over 150 calls each. Polygraphs are one of the single largest sources of complaints received by the ACLU.

Nineteen state polygraph regulatory boards responding to an ACLU survey this year reported a total of only 34 complaints in 1986, although 2,243 examiners were licensed. They reported fining one person, suspending the licenses of nine, six of which were quickly lifted, and revoking only two. The states responding reported that they had only revoked seven licenses in the last ten years. (A copy of the survey results is attached as Appendix 2.)

By contrast, ACLU offices in these same 19 states reported 854 complaints about polygraph examinations in the same time period -- twenty-five times the number reported by the state agencies. This leads to the conclusion that state polygraph regulatory boards are for the most part virtually invisible and inactive. In the face of growing employee concern, they produce hardly a trickle of activity.

In addition, simply "regulating" polygraph testing begs the key issue of polygraph validity. No amount of training or experience on the part of an examiner can overcome the glaring absence of scientific evidence supporting the underlying premise of lie detector testing, particularly in the area of pre-employment or random screening. No amount of procedural "safeguards" or detailed statutory instructions on how employment polygraph tests may be conducted can alleviate the fundamental unfairness of claiming to measure an individual's integrity by means of this dubious process.

The "States Rights" Argument

Spokespersons for the Department of Justice have asserted in testimony that to enact legislation prohibiting the use of polygraph examinations would violate the structure established by the Constitution to apportion power between the state and federal governments, what is known as states rights. Last year's

Committee report on the Polygraph Protection Act of 1985 documented the ways in which this view does not comport with established law.

In fact, the Department itself has been inconsistent in its commitment to these principles, it has asked the Supreme Court this term to overturn state laws in the areas of workers' severance pay, pregnancy leave and affirmative action on the grounds that they were pre-empted by federal law. (See attached New York Times article "The States' Rights Can Vary With The Issue", 6-14-87.)

There is mounting evidence that employers are circumventing state laws by requiring employees to cross state lines and take tests in states which do not have polygraph restrictions. Given these circumstances, the need for a federal law seems clear.

Conclusion

Twelve years ago, Sam Ervin's staff on the Senate Judiciary Subcommittee on the Constitution in its study on "Privacy, Polygraphs, and Employment" reached a reasoned conclusion which is still valid today:

> Compulsory submission to a polygraph test is an affront to the integrity of the human personality that is unconscionable in a society which values the retention of individual's privacy. Employers have a multitude of less objectionable resources at their disposal for investigating applicants' backgrounds and employees' performances. Expediency is not a valid reason for pitting individuals against a degrading machine and process that pry into their inner thoughts. Limits, beyond which invasions of privacy will not be tolerated, must be established. The Congress should take legislative steps to prevent ... the private sector from requiring, requesting, or persuading any employee or applicant for employment to take any polygraph test.

Appendix 1

ACLU SURVEY OF STATE POLYGRAPH LAWS

States with No Regulation of Polygraph Examinations	9

Colorado
Indiana
Kansas
Missouri
New Hampshire
New York
North Dakota
Ohio
Wyoming

States which Regulate Polygraph Examiners	19

Alabama
Arizona
Arkansas
Florida
Georgia
Illinois
Kentucky
Louisiana
Mississippi
Nevada
New Mexico
North Carolina
Oklahoma
South Carolina
South Dakota
Tennessee
Texas
Utah
Virginia

States with Prohibition on Requiring Polygraph Tests which Allow Employers to "Request" Tests	10

California
Hawaii
Idaho
Iowa
Montana
Maryland
Nebraska
Pennsylvania

Prohibit requiring, cont.

Vermont
Wisconsin

States Which Prohibit Requesting or Requiring Polygraphs for Most Employees	12 + D.C.
Alaska	Massachusetts
Connecticut	New Jersey
Delaware	Oregon
Maine	Rhode Island
Michigan	Washington
Minnesota	West Virginia
	D.C.

APPENDIX 2

ACLU POLYGRAPH EXAMINERS SURVEY

1. How many licensed/registered polygraph examiners are there currently in your state? ____

2. How many polygraph examiners were the subject of official complaints last year? (January through December 1986) ____

3. Last year, due to the actions of your Board/agency, how many polygraph examiners
   were fined? ____
   had their license suspended? ____
   had their license revoked? ____
   underwent other disciplinary action (specify)? ____

4. In the past ten years, due to the actions of your Board/agency, how many polygraph examiners
   were fined? ____
   had their license suspended? ____
   had their license revoked? ____
   underwent other disciplinary action (specify)? ____

ACTIONS IN THE LAST YEAR

State	# lic	# Comp	fined	suspend	revoked	other	ACLU Complaints
Alabama	203 (98 res)	1	c	1	0	c	12
Arizona							
Ark.	85 (25 res)	1	0	0	0	0	50
Calif.							
Fla.	500	2	1	-	-	-	240
Georgia							
Illinois							
Iowa	5	0	0	0	0	0	24
Ky.	128 (42 res)	0	na	na	na	na	24
La.							
Miss.	164	0	0	6a	0	0	12
Montana	23	0	0	0	0	0	5
N							

In last year state	#	comp.	fined	susp.	revoked	other	complaints
Vermont	38	0	0	0	0	0	6
VA	294	5	0	0	0	0	50
Wisc.	?	18	0	0	0	7	12
T 25 19	2243	34	1	9	2	10	854

ACTIONS IN LAST 10 YEARS state	fined	susp.	revoked	other
Alabama	c	9	3	2d
Arkansas	0	2	0	0
Florida	(not available)			
Iowa	0	0	0	0
Maine	0	0	0	0
Michigan	0	0	0	0
Mississippi	0	30a	2	12b
Montana	0	0	0	0
Nebraska	0	0	0	0
Nevada	2	0	0	0
N. Carolina	(statistics unavailable)			
Oklahoma	0	2	1	0
S. Carolina	2	1	0	0
S. Dakota '84	0	0	0	0
Tenn. (since 81)	0	1	1	7
Texas	refused to fill out survey			
Utah	(did not send)			
Vermont	0	0	0	0
Virginia	(not available)			
Wisconsin	(don't know)			
T	4	43	7	21

a) suspended for non-payment of license renewal fee, failure to provide proof of insurance, none suspended for disciplinary reasons. All reinstated by years end.
b) extended internship period, denial of application for license.
c) state has no authority to assess fines. They can suspend automatically for failure to notify of change of address. These types of suspensions are not reflected in the figures.
d) 1 letter of reprimand, one arrested for testing wo a license.

Hawaii has no statute regulating polygraph examiners
Oregon has a total ban 55 1 0 0 0 0

The States' Rights Can Vary With The Issues

NYT 6/14/87 p.4 SIV

By STUART TAYLOR Jr.

WASHINGTON

CONSERVATIVES and sometimes liberals speak with reverence of what the Supreme Court has called "our federalism." But it is not easy to find anyone in public life who cannot rationalize away his commitment to federalism when it gets in the way of other cherished goals.

Attorney General Edwin Meese 3d, Chief Justice William H. Rehnquist and others are on solid ground in complaining that the Supreme Court has largely stopped trying to restrain Federal encroachments into state sovereignty, which the framers of the Constitution intended to prohibit. But in a world very different from that of the framers, these champions of federalism are highly selective in their respect for state prerogatives.

This is not to say that federalism has become an empty slogan or that all federalists are hypocrites. In interpreting ambiguous acts of Congress and in enforcing various constitutional provisions, the Court often strains to avoid trampling on state prerogatives. And federalism concerns have occasionally kept the Administration from joining in legal arguments that might serve its narrow political advantage. Last year, for example, it failed to join — although it did not oppose — a successful attack by the Republican National Committee and others on partisan gerrymandering by state legislatures, most of which are controlled by Democrats.

But it was Mr. Meese's Justice Department, for example, that asked the Supreme Court to uphold a 1984 Act of Congress — signed by President Reagan in an election-year flourish of concern about drunk driving — that pressured states to raise their drinking ages to 21, on pain of losing millions of dollars in Federal highway grants. Whatever the law's merits as social policy, it is impossible to reconcile with the Administration's professed devotion to the principle of federalism, says a coalition of major state and local government groups that filed a brief attacking the 1984 law. The case is to be decided soon.

Court Goes Its Own Way

It was also Mr. Meese's Justice Department that urged the Court to strike down a Maine law requiring severance pay for workers laid off in plant closings, saying it was preempted by a 1974 Federal law. The Court rejected this argument this month, 5-4, with Chief Justice Rehnquist in dissent.

Earlier in this Supreme Court term, the department argued for the overturning of a California law that requires employers to give up to four months of leave without pay for pregnancy and childbirth, a local government's affirmative action plan for women and minorities and an Indiana law restricting corporate takeovers.

The Court rejected the Administration position in each of these cases. Among the dissenters in the first two was Chief Justice Rehnquist. As with Mr. Meese, his commitment to federalism seems to be outweighed by his sensitivity to claims of discrimination by white males challenging affirmative action programs, in particular those adopted by local governments.

Conservatives have no monopoly on inconsistency in this area. Liberals, after decades of seeing the national Government and courts as the engines of progress and distrusting the states, have more recently embraced the prerogatives of states to devise their own approaches to social problems as President Reagan has moved the Federal Government and courts to the right.

'Separate Spheres'

It was Justice William J. Brennan Jr., never bashful about overturning state laws that conflict with his liberal approach to civil rights and civil liberties, who wrote the majority opinion upholding the power of state governments to require severance pay for laid-off workers. He invoked "respect for the separate spheres of governmental authority preserved in our federal system." Justice Brennan has also applauded the "marvelous enthusiasm" with which some state courts have found broader civil liberties protections in their state constitutions than the Supreme Court has in similarly worded Federal provisions.

But Justice Brennan's occasional embrace of federalism seems more "a doctrine of convenience than of principle" to Assistant Attorney General Charles J. Cooper. He was the principal author of an Administration report last year that lamented "the evisceration of federalism as a constitutional and political principle." The report severely criticized a 5-4 ruling in 1968, with Justice Brennan in the majority and then Justice Rehnquist in dissent, in which the Court made it clear it would not stand in the way of Congressional violations of the Tenth Amendment. The Amendment commands that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

In an interview, Mr. Cooper said, "Somebody's fidelity to the principles of federalism is never tested until it hurts," acknowledging that many conservatives, as well as liberals, will abandon their concern for state prerogatives if they disapprove of the outcome of the state or local political process. Nevertheless, he said, "This Administration has been more faithful to the federalism principle than others."

It has, at least, taken care not to point the finger of blame at itself. A near-final draft of Mr. Cooper's report on federalism listed the 1984 drinking-age statute among several Federal encroachments on the states' "sovereign prerogatives." In the final report, this reference had been deleted. Perhaps somebody recalled who had signed the bill into law.

The CHAIRMAN. We will stand in recess.

[Whereupon, at 12:05 p.m., the Committee adjourned, subject to the call of the Chair.]

75-442 (192)